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HUNTER'S
Suit in Equity.
THIRD EDITION.
BY
G. W. LAWRENCE.

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OF A

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OF THE
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IN A
Suit in Equity.

WITH AN
APPENDIX OF FORMS.

BY
SYLVESTER JOSEPH HUNTER, B.A.,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

THIRD EDITION.

BY
GEORGE WOODFORD LAWBRANCE, M.A.,
OF LINCOLN'S INN, BARRISTER-AT-LAW.



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PREFACE TO THIRD EDITION.

SINCE I prepared the Secoud Edition of this work the Author has retired from the profession, and left the work in my hands.

A Third Edition being now called for, I have carefully prepared it, and it will, I think, be found to embody all the alterations in, and additions to, the procedure and powers of the Court of Chancery, which have been made since the Second Edition was issued.

G. WOODFORD LAWRENCE.

*7, New Square, Lincoln's Inn,
31st March, 1865.*

PREFACE TO SECOND EDITION.

IN preparing the Second Edition of this work for publication at the request of the Author, I have endeavoured, while adhering as closely as possible to the original plan of the work, to increase its utility, by the addition of references to authorities in support of the text, such authorities being either particular Statutes, or Decided Cases, or the General Consolidated Orders of the Court of Chancery.

Recent alterations in the mode of taking evidence in Chancery and in other parts of Chancery procedure, have made it necessary to alter considerably some portions of the work.

G. WOODFORD LAWRENCE.

40, *Chancery Lane*, April, 1862.

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THIS little Book makes no pretension to the character of a complete treatise. It is intended merely to give to the Student, on commencing his preparation for practice in the Court of Chancery, a short view of the nature of the business which will come before him in a Solicitor's Office, or in the Chambers of an Equity Draftsman.

S. J. H.

15, *Old Square, Lincoln's Inn,*
June, 1858.

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ELEMENTARY VIEW
OF THE
Proceedings in a Suit in Equity.

ERRATA.

- Page 20, line 2, omit words "interleaved and."
" 30, " 22, *for* "parchment" *read* "paper."
" 38, " 20, the like.
" 61, " 20, the like.
" 198, " 9, the like.
" 41, " 25, *for* "accept" *read* "except."
" 52, " 21, *for* "none" *read* "done."
" 110, " 11, *for* "one such" *read* "any such."
" 151, " 22, *for* "Queen's" *read* "Whitecross Street."
" 152, " 9, the like.

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the defendant may be forced to answer on oath questions proposed to him by the plaintiff with reference to the subject of the suit. The right to have such answers given is termed the right to Discovery, as distinguished from the right to Relief, properly so called, to which it is usually subservient: it will be seen hereafter that the discovery is usually obtained at a much earlier stage of the suit than that at which specific relief is given.

From the works just alluded to may be learned what relief and what discovery are obtainable under given circumstances; but no relief nor discovery will ever be obtainable unless they are asked for in proper form. A great body of rules exists as to the form in which matters are to be brought before the Court, which rules are partly written in Acts of Parliament and the General Orders of the Court, and partly not written in any authoritative form, but residing in the breasts of the Judges of the Court, in the same manner as the Common Law, as distinguished from the Statute Law, resides in the bosoms of the Judges of the three Courts at Westminster, and not in any authoritative written document: though in both cases treatises have been composed embodying these matters in a written, but unauthoritative form. These rules are divided into two great branches: the rules of Pleading tell what is the most efficient form to adopt in shaping the written statements of the cases of the parties before the Court: the rules of Practice tell in what manner these written statements should be brought under the notice of the Court, and what steps should be taken to obtain the benefit of them. The standard work on the former

subject is Lord Redesdale's 'Treatise on the Pleadings in the Court of Chancery,' which has been lately edited with notes of points decided since the former edition, by Mr. Josiah W. Smith: the latter rules, which were very materially altered by the legislation of 1852, are collected in the recent edition, by Mr. Headlam, of Mr. Daniell's 'Chancery Practice,' and in the treatise of Mr. Sidney Smith. In these books the reader will find a full discussion of all the matters treated of in the following work, together with references to the authorities bearing on the subject. In the last edition of Mr. Ayckbourn's treatise are given short statements of the old practice on various points, together with the exact words of the statutes and Orders of 1852, by which it has been altered: this book is thus rendered a convenient book of reference in practice.

We have said that the law of the Court is contained partly in written statutes and orders, and partly in the unwritten knowledge of the Judges. When any point arises on which both statutes and orders are silent, the Judge declares what always has been the practice of the Court on the point: sometimes he declines to do so until he has learned what is the opinion of unprejudiced persons who are most conversant with the matter in question, such as the officers of the Court to whose department it belongs; this is ascertained by sending a question to the office, to which an answer is returned in the shape of a certificate signed by the officers: or, if there be a difference of opinion, more than one certificate will be returned. This certificate has no binding authority, though of course it will

have weight with the Judge, by whose own opinion the practice is determined.

Parliament, in the exercise of its supreme power, from time to time passes statutes regulating the practice of the Court, and sometimes these statutes empower the Judges to make General Orders, filling up details left undetermined by the statute. Besides these orders made in pursuance of a statute, the Judges have a power of making general orders to regulate any points which have hitherto been left untouched, or to alter any prior general orders, but of course without abrogating any part of a statute. The Judges have a discretionary power of relaxing these general orders in any particular case where the strict observance of them would work injustice. It may be observed that, in Hilary Term, 1860, all the general orders previously made were abrogated (with a few exceptions) and a series of new orders made (known as the Consolidated Orders), to which are appended schedules of forms of various Chancery proceedings. Many of the new orders are in fact repetitions, sometimes without variation, sometimes with slight variation, of the old orders, but the consolidators wisely avoided any questions which might arise (as has been frequently the case with Acts of Parliament) as to whether an order had been virtually or impliedly repealed, by first repealing and then reviving. Several new orders have been made since Hilary Term, 1860.

The business of the Court is carried on by Judges, at present seven in number, and various officers, who are principally occupied with merely ministerial, and not judicial functions.

The Judges are the Lord High Chancellor, the Master of the Rolls, the Lords Justices of the Court of appeal in Chancery, and the Vice-Chancellors.

The Lord Chancellor is one of the few great officers of early times whose duties are not now executed by a commission. The office is held during the pleasure of the Crown, and is conferred by the delivery of the Great Seal: this was the seal by which alone in early times all royal writs and patents were authenticated, and it naturally followed that the Keeper of the Seal would not affix it to any document, till satisfied of the propriety of doing so. Every action at law had to be commenced by an original writ out of the Chancery, sealed with the Great Seal: this writ varied in form according to the circumstances of the case, and the power of framing new forms as occasion might require was in the thirteenth year of Edward I. given to the Clerks in Chancery by the Statute of Westminster the Second. But cases frequently occurred in which no original writ could be framed, so as to raise an action leading to a judgment which would do complete right: although the defendant's conduct was "contrary to equity and good conscience," yet the complainant was "wholly without remedy at the Common Law." It seems that the evil of this was first felt to be pressing in the case of feoffments to uses, where it is well known that before the passing of the Statute of Uses in 1536, the feoffee was absolute owner of the land at law, although he could not in conscience refuse to carry out the intention of the feoffor. The *cestui que use* finding that he could get no assistance against his feoffee from any of the original writs which the Clerks

in Chancery furnished to him, frequently petitioned the Chancellor himself to give redress. This the Chancellors began to do about the time of Richard II., by summoning the feoffees before them, and after due investigation of the case, by ordering the doing of what appeared to be right. Moreover the Chancellors of those times were generally civilians, to whom it seemed that the readiest mode of ascertaining the facts of the case was to ask the accused person what he knew. Thus, we see how, by the agency of a writ called a Subpœna, calling on the defendant to appear and answer, the complainant was enabled to get the Relief and Discovery which, as has been said, constitute the two branches of the assistance rendered by Courts of Equity. It will be readily understood that the account above given of the origin of the Equitable Jurisdiction of the Court is extremely imperfect.

Besides his jurisdiction as head of the Court of Chancery, the person to whom the custody of the Great Seal is entrusted has various other duties and powers, with which we are not at present concerned. Sometimes this officer has not the title of Lord Chancellor, but only that of Lord Keeper; and sometimes the Seal is put in Commission, that is to say, is entrusted to two or more persons, who are usually selected from among the Judges of the Courts of Common Law or Equity.

The Master of the Rolls was originally nothing more than the keeper of the records in Chancery, and great obscurity hangs over his acquisition of judicial power: he is now a judge, having jurisdiction over the same matters as the Lord Chancellor in his capacity of head

of the Court of Chancery. According to modern practice, all applications to the Court are referred in the first instance to the Master of the Rolls or one of the Vice-Chancellors, and nothing comes before the Lord Chancellor except by way of appeal from the first decision, which appeal is sometimes heard by the Lord Chancellor alone, sometimes by the Lords Justices alone, and sometimes by the Lord Chancellor and Lords Justices sitting together. Of course, however, none of the inferior Judges can entertain applications, over which (as in lunacy and patent cases) the Lord Chancellor has original jurisdiction. Thus, if a patent has been sealed by the Lord Chancellor, and enrolled in Chancery, any one who wishes to obtain the repeal of the grant of the Patent, must apply to the Lord Chancellor for a writ of *scire facias*; which issues out of what is called the "common law side" of the Court of Chancery.*

The Lords Justices, who are two in number, were first appointed under an Act of Parliament passed in 1851:† they have no original jurisdiction in Equity, but form, as just stated, a Court of Appeal: they have also jurisdiction in Lunacy and Bankruptcy, with which we are not now concerned.

The Vice-Chancellors have been appointed from time to time under different statutes: one was appointed in 1811, and two more, on the abolition of the equitable jurisdiction of the Court of Exchequer in 1842: since that time the number has fluctuated,

* See 12 & 13 Vict. c. 109, regulating the practice of this side of the Court.

† 14 & 15 Vict. c. 83.

but is at present three. They and the Master of the Rolls have co-ordinate jurisdiction in the first instance over all matters of Equity, subject to the revision of the Court of Appeal. From the decision of any of these Judges in Chancery, an appeal lies to the House of Lords.

The principal officers of the Court to whom our attention must be directed are the four Clerks of Records and Writs, the two Examiners, the Registrars, the three Chief Clerks to the Master of the Rolls,* and the two to each of the Vice-Chancellors, and the six Taxing Masters. The duties belonging to these officers respectively cannot be conveniently stated here, but will be found in the ensuing pages.

Though it is competent for any person to prosecute or defend a suit in Equity on his own behalf, yet it is usual to make use of agents for the purpose; the only persons allowed to practise as such agents are those who have been admitted by the Master of the Rolls to be Solicitors of the Court, after having passed through the same course of training and examination as attorneys-at-law are obliged to undergo; in fact, it seldom happens that any person is admitted a solicitor without having previously been admitted an attorney.

Solicitors are allowed to represent their clients in almost all parts of a suit, except those where a personal appearance in Court before the Judge is required from the party or his agent: here solicitors are, as a

* By the 27 & 28 Vict. c. 15, an additional Chief Clerk was appointed to the Master of the Rolls, so that he has now three Chief Clerks.

rule, excluded: the parties may appear in person, but if they use agents, these agents must be Barristers, or persons who have been called to the Bar by one of the four Inns of Court; and, by the etiquette of the profession, these barristers cannot act except on instructions given to them by solicitors. Besides thus representing the parties in Court, barristers give advice on the conduct of suits, and this advice cannot be obtained without the intervention of a solicitor.

Though we thus see that it is in theory possible for a party to conduct his own suit in person, yet practically this can hardly be done. We shall therefore throughout this work suppose the parties to be represented by solicitors, and shall frequently speak of the plaintiff or of the defendant, meaning their respective solicitors; this avoids the wearisome repetition of the same word, while the context or the form of expression will sufficiently indicate those few cases where the party himself, and not his solicitor, is spoken of.

In the preceding slight sketch of the origin of the equitable jurisdiction of the Court of Chancery, we said that a petition embodying the cause of complaint was presented to the Chancellor: this petition is called a bill; and the filing of a bill is still the regular and most formal manner of commencing proceedings in Chancery; when this has been done, an answer may be obtained, giving the necessary discovery; and then a decree is made, giving the relief to which the plaintiff has shown a title. A proceeding commenced by bill is termed a Suit, and the Course of a Suit up to De-

Decree will form the subject of our First Part. The Decree is by no means in general the end of the suit, but after that point the proceedings assume a character very different from what they had before: moreover, there is often occasion in the course of a suit to adopt measures which cannot be considered as forming part of the ordinary course: these will be treated of in the Second Part. The assistance of the Court can also be had in some particular cases, without any bill filed: the proceedings in these cases, which are mostly taken under statutes, will be considered in our Third Part.

PART I.

THE REGULAR COURSE OF A SUIT UP TO DECREE.

WE have seen that in a Suit, the first thing to be done is to file a Bill : this Bill is a statement of the plaintiff's case put into a proper form, which will be described in the First Chapter. The Second Chapter will explain how this bill is filed, and served on the defendant, after which the defendant appears, or submits to the jurisdiction of the Court : the plaintiff may then serve him with interrogatories or questions, by the answers to which the required discovery will be given. The Third Chapter will explain the courses open to the defendant to resist the plaintiff's claim to discovery, and also the form of the Answer in which, if compelled, he gives it. The steps to be taken by the plaintiff after an answer has been put in, with the view of obtaining the Decree of the Court, will be the subject of the fourth Chapter, while the Fifth will treat of the mode of taking evidence as to the facts in dispute. In the sixth, the hearing of the cause will be described ; and also the nature and form of the Decree, the obtaining of which is the last step with which we are concerned in the present Part.

CHAPTER I.

THE BILL, ITS NATURE AND FORM.

WE learn, from Lord Redesdale's Treatise, that "A suit to the extraordinary jurisdiction of the Court of Chancery, on behalf of a subject merely, is commenced by preferring a bill in the nature of a petition to the Lord Chancellor. But if the suit is instituted on behalf of the Crown, or of those who partake of its prerogative or whose rights are under its particular protection, as the objects of a private charity, the matter of complaint is offered to the Court, by way of information, by the Attorney-General or other the proper officer, and not by way of petition." Between bills and informations there is so little difference, that we shall speak of the former only, pointing out from time to time the peculiarities of the latter.

The bill is generally, if not invariably, prepared by counsel, who for this purpose is furnished with such papers as are necessary. We now refer the reader to the specimens of bills which will be found in the Appendix, No. I., and will then proceed to describe the various parts of which they consist, making such observations as seem necessary for explaining the use of each part.

These parts appear to be four in number : the Title,

the Address, the Statement, and the Prayer. Some of these will be found to include subordinate divisions.

The title consists of the name of the Court, "In Chancery," and of the branch of the Court to which the suit is attached (which is selected by the plaintiff at his pleasure), together with the names of the parties to the suit.

We do not intend to state here the rules governing the selection of proper parties to a suit, which in spite of great simplifications introduced by the Jurisdiction Act of 1852, are still sometimes the subject of complicated considerations. In general, we may say that (subject to certain statutory exceptions) all persons interested in the subject-matter of a suit *with respect to its object* are necessary parties to the suit. Sometimes, when there is a class of persons all having the same interest, and the class consists of so large a number of individuals, that they could not all be made parties without extreme inconvenience, it is allowed to name one or more of the class to represent the rest: and this may be done whether these persons appear as plaintiffs or defendants. The most common case is where a suit for the administration of the estate of a deceased person is brought by one creditor "on behalf of himself and all the other creditors of" the deceased: in this case the suit is termed a Creditor's Suit.

It is clear that in such a case all the persons on whose behalf the suit is brought have the same interest, it being the object of them all alike to make out the estate of the deceased to be as large as possible: and care must always be taken that no persons are

joined as plaintiffs between whom there is any opposition of interest, and especially that no person be included among the plaintiffs who is also named as a defendant. Thus we may suppose a bill brought by a shareholder to wind up the affairs of a joint-stock company, and to make the directors responsible for alleged frauds, and that several of the shareholders have released the directors from all claims on account of the conduct impeached. To this bill all the shareholders would be proper parties, but if they are very numerous they need not all be named, and clearly none could properly be named as plaintiffs except those who had refused to execute the release: the bill would therefore be brought by A. B. on behalf of himself and all other shareholders in the company except such as are named as defendants thereto, and except all others who have executed a certain deed of release hereinafter mentioned, dated, etc., and to this bill the defendants would be the directors, and one or more of the releasing shareholders. It is not usual to mention that persons are made defendants as representatives of a larger class.

No general rule can be given as to the cases in which such representation will be allowed, the Court considering, on the circumstances of each case, whether substantially the interests of the class are secure: the persons who would have been necessary parties to the suit under the old practice, are served with notice of the decree, and may obtain an order of course to appear and take part in the proceedings subsequent to the decree. The enactments on this head will be found in 15 & 16 Vict. c. 86, s. 42, which Act

bears the title of, "An Act to amend the practice and course of proceeding in the High Court of Chancery," and is the basis of all the modern improvements on the subject. Hereafter it will be shortly referred to as "The Jurisdiction Act."

It will be shown hereafter in what manner the defendant can raise the objection that the parties to the suit are not properly chosen.

When the suit is commenced by information instead of by bill, the plaintiff is the Attorney-General for the time being: and if the information is brought to enforce a private right, it is usual to name some person at whose "relation" the Attorney-General acts: such relator is responsible for the conduct of the suit and for the costs, in the same manner as an ordinary plaintiff.

We must next consider the address by the plaintiff to the Lord Chancellor, of which the form will be found in the Appendix: on every change in the custody of the Great Seal, notice is given of the title by which the new holder is to be addressed. When a Peer is plaintiff, the word "humbly" is omitted, and in an information, "informing" is substituted for "humbly complaining."

It will be seen that the address contains the residence and description of the plaintiff: if this be omitted, or given falsely, or show that the plaintiff resides out of the jurisdiction of the Court, it may be a ground for staying all proceedings in the suit until security shall have been given for the costs. More is said on this subject at the end of our chapter on Costs.

The statement of the plaintiff's case next follows, and consists mainly of a history of the matter with respect to which the assistance of the Court is asked: this should contain an allegation of every fact on which the plaintiff relies, so as to give fair warning to the defendants of the case which they are required to meet: for the plaintiff will not be allowed to inquire after by his interrogatories, nor to prove at the hearing anything which does not tend to support an allegation in his bill.

In addition to this history of the matter, which corresponds to the stating part of the bill mentioned in Mitford's 'Pleadings' and other old books, the statement often contains *charges* and *pretences*. Charges consist of allegations which the plaintiff does not know to be true, or at any rate is not able to prove; but which he suspects to be true, and as to which he wishes to have the answer of the defendant. Charges are also used in stating, as a conclusion of law, the relief to which the plaintiff thinks himself entitled. Pretences are used when some defence is anticipated as likely to be set up, and it is wished to negative it at once. Specimens both of charges and pretences will be found in the precedents of the bills referred to: they are never necessary, though often convenient.

The last paragraph of a bill used to be almost always and still is sometimes a charge that the defendant has in his possession or power, some books and papers relating to the matter in question: this charge enables the plaintiff to ask whether the fact be not so, and if the answer admit the fact, the plaintiff can at

once obtain the production of the documents, which may be of the greatest service to him. The plaintiff is not obliged, however, to insert this charge in the bill, but may interrogate the defendant, as to the documents in his possession, even though there be no such charge.* And now the plaintiff very frequently (without interrogating as to documents) obtains an order by summons at the Judges' Chambers that the defendant make an affidavit, stating what documents he has in his possession, and that he produce the same. (See Seton on Decrees, 1040.)

Lastly, we come to the Prayer. This asks for the relief to which the plaintiff conceives that the case stated in his bill entitles him, and concludes with a prayer for general relief, under which any relief may be given to which a title is made out at the hearing: it is not, however, well to trust to this, but the specific relief sought should be expressly prayed, and this may even be done in the alternative, so that if the Court should not think that the case made out justifies the relief first asked for, yet the plaintiff may have some other to which he is entitled.

As to the nature of the relief prayed for by bills, it is almost infinitely various. The pleader should in each case consider what decree he hopes to obtain at the hearing, and put this into the form of a prayer: the species of relief mostly usually sought are declarations of right, references for accounts, inquiries, and the like, and the issuing of particular writs, as of injunction, *ne exeat*, etc.; moreover if the plaintiff thinks that he is entitled to ask it, he should expressly

* *Perry v. Turpin*, 1 Kay, App. 49.

pray that the defendant may pay all the costs of the suit, and it is usual to insert a prayer that all proper steps may be taken for carrying out in detail the objects sought. More will be learned as to the nature of prayers, by consulting what will be said on decrees in a future chapter.

The signature of the counsel who drew the bill follows the prayer. Without such signature no bill can be filed : and it is understood that it is to be regarded as a security that, judging from the written instructions laid before the counsel of the case of the defendant as well as of the plaintiff, there appeared to him at the time of framing the bill to be good ground of suit. Mitf. Pl. 48 (*a*). The bill concludes with the names of the defendants, and the name and address of the solicitor by whom it is filed : this address must be within three miles of the Record and Writ Clerks' Office in Chancery Lane, or else a place must be named within that distance, called an address for service, at which notices and other proceedings in the suit may be left.

CHAPTER II.

SERVICE OF THE BILL AND CONSEQUENT
PROCEEDINGS.

AFTER the bill has been prepared it must be printed and filed, and copies served upon the defendants: the defendants must appear, and the plaintiff may then file and serve interrogatories for the examination of the defendant. This chapter, therefore, divides itself into three sections.

SECTION 1.

Service of the Bill.

When the bill has been prepared by counsel, as explained in the last chapter, the next step is to have it printed. But whenever a bill prays a writ of injunction, or *ne exeat*, or is filed for the purpose, either solely or amongst other things, of making an infant a Ward of Court, a written copy may be filed: in these cases, a printed copy must be filed within fourteen days, or otherwise the written copy will be taken off the file, and the suit must be recommenced. No costs will be allowed in respect of a written bill, without the special directions of the Court: and when a bill is taken off the file for default in filing a printed copy, the defendant is entitled to have his costs taxed and paid immediately.

A copy of the bill, printed or written as the case may be, is interleaved and taken to the Office of the Clerks of Records and Writs, by the proper one of whom it will be filed, and will thus form the commencement of the record of the suit. The Clerks of Records and Writs are four in number, and business is distributed among them according to the initial letter of the surname of the first plaintiff in the suit : one undertake the filing of the bill, and of all subsequent proceedings in suits, where the surname of the first plaintiff begins with any of the letters A, B, C, or D : the letters from E to K belong to the second clerk ; those from L to Q to the third, while the fourth takes the remainder of the alphabet.

As soon as the bill is filed, the Record and Writ Clerk will stamp any number of copies presented to him for that purpose, with a seal denoting the date of filing, and will mark them with a "reference to the record," consisting of the year in which the filing takes place, the initial letter of the first plaintiff's surname, and a number denoting the place of this suit among those filed in the same year, and having the same initial letter : thus, if on any day of the year 1858 there have been during that year twenty-five bills filed having A for the first letter of the surname of the first plaintiff, and another is brought to the office having the same initial, the reference to the record for this one will be 1858 A. 26. This reference to the record is indorsed on all proceedings filed in the cause.

So far the defendants may be ignorant that any suit is in contemplation ; the next step is to apprise them

of its existence. This is done by delivering to each of them a copy of the bill bearing the seal mentioned as proving the fact that a copy has been filed, and also having indorsed on it, either in writing or in print, a writ or letter from the Queen to the defendant, commanding him within a limited time to appear to the bill: this writ is in the form given in the Appendix No. II.

When it is found impossible to effect personal service on a defendant, but some other mode can be suggested of securing that the filing of the bill may come to his knowledge, the Court will sometimes allow of what is called "substituted service," or service upon such person or in such manner as will secure this object.* Thus, when a person keeps out of the way after having commenced an action at law against another, and the defendant at law asks the assistance of the Court of Chancery with respect to the subject of the action, substituted service will generally be ordered on the attorney of the plaintiff at law.

Each defendant may require from the plaintiff any number, not exceeding ten, of printed copies of the bill, on paying for them at the rate of one half-penny the folio. We may here remark that the length of proceedings in Chancery is now counted at the shorter rate of seventy-two words to the folio, instead of ninety, which was the rate in use until the Order of the 2nd June, 1854. In the amendment of bills, however, the practice of the Record and Writ Clerks' Office is to reckon ninety words to a folio.

* See 10th Cons. Ord. rule 2.

the signature of counsel, and a note stating which interrogatories each defendant is required to answer.

It is not compulsory upon the plaintiff to file any interrogatories at all; and in fact it frequently happens that none are filed: of course, then no discovery can be had. And even when discovery is required from some of the defendants, there may be others from whom none is sought; and in every case it is in the discretion of the plaintiff what questions he shall put to each defendant: this discretion is exercised by the note placed by the plaintiff's counsel at the foot of the draft interrogatories.

When drawn and settled, the interrogatories are engrossed on parchment, and the engrossment is taken to the Clerk of Records and Writs for the proper division, by whom it is filed: this must be done within eight days from the time limited for the appearance of the defendant, or sixteen days from the date of the service of the bill upon him.

When the interrogatories have been filed, and the defendants have appeared, the plaintiff's solicitor makes a copy of such of the interrogatories as each defendant is required to answer, and takes it to the office: it is there compared with the engrossment, and, if found correct, is sealed by the clerk, to indicate that it has been so examined; and then it is served on the defendant's solicitor, or on the defendant himself, supposing him to have appeared in person.

After serving any document on the opposite party, it is well for the person who effects such service at once to make a memorandum of the time and place, in order that he may be able to swear to the fact, in

case it should, at any subsequent stage of the suit, become requisite to do so. At common law, it is ordered that such a memorandum should be at once made on the writ, after service has been effected by showing the original and delivering a copy.

CHAPTER III.

THE DEFENCE.

WE now come to the consideration of the steps which must be adopted by the defendant for the purpose of resisting the plaintiff's demand. These will vary according to the nature and extent of the defence which it is intended to set up: if the defendant think that the case stated on the bill is not such as to entitle the plaintiff to any assistance from the Court, the form of defence is termed a demurrer: if the defendant can allege new matter which, when taken in conjunction with what is stated on the bill, shows that the plaintiff is not so entitled, the defence is termed a plea: when the defendant feels that he cannot resist giving the discovery required, he gives it by an answer, which, when the defendant disclaims all interest in the matters in question, is termed a disclaimer. An answer may also contain a statement of such new facts as the defendant thinks favourable to his case.

After having answered the interrogatories, if any, the defendant may himself file interrogatories for the examination of the plaintiff, to which the plaintiff will be compelled to put in an answer. This chapter therefore will contain four sections: the first, on Demurrers; the second, on Pleas; the third, on

Answers and Disclaimers ; and fourth, on interrogating the Plaintiff.

SECTION I.

On Demurrers.

We have already said that the plaintiff should state on his bill every fact on which he relies as giving him a title to the relief prayed, and that nothing can be proved on his behalf at the hearing which is not stated on the bill : it is clear therefore that, if the statements are not such as to entitle the plaintiff to the relief sought, even supposing them to be fully proved and nothing to be proved in opposition, the plaintiff will not be able to get any relief at the hearing. Moreover, since the right to have answers to the interrogatories is merely subsidiary to the right to relief, when this fails the right to discovery fails also: hence in case such a bill be filed, the plaintiff can get nothing by it, and the interest of all parties requires that the suit should be put an end to as soon as possible.

If therefore the defendant thinks that the bill is such as above described, he is at liberty to take the objection at once, and thus save the expense and trouble of further proceedings: the mode of taking the objection is by putting in a demurrer.

The word demurrer is derived through the Norman French, from the Latin *demorari*, and signifies a stoppage in pleading. At common law, a demurrer is the assertion by one of the litigant parties that the last pleading of his adversary is not sufficient in law: thus, if a defendant demur, instead of putting in a

plea, he alleges that the declaration does not disclose any ground of action; and if the plaintiff demur, instead of replying, he alleges that the plea does not disclose any sufficient answer to the declaration: in each case the demurrer admits the truth of the facts alleged, but disputes their sufficiency.

Now, in considering a bill in Chancery as analogous to a declaration at Law, we must remember that the former has two objects, relief and discovery: and the primary object of a demurrer is to resist the giving the discovery, which, as we have already said, is usually done by alleging that the plaintiff has not shown any right to relief, to which that to discovery is usually subsidiary. Cases however are not wanting in which a demurrer will protect the defendant from giving the discovery, although the bill shows a title to relief. A demurrer in Chancery will therefore be seen to be exactly analogous to a demurrer to a declaration at Law. In both cases, if the demurrer be held sufficient when argued, there is an end to the suit: if held insufficient, the plaintiff at Law has judgment, unless the defendant have put in pleas, in which case the pleas are proceeded upon as if no demurrer had been put in. In Chancery, we shall see hereafter that if a demurrer be overruled on argument, the defendant must resort to some other defence.

In Mitford's 'Pleading,' and many other books, is given a classification of the grounds on which bills praying relief may be demurrable, which grounds are reduced to nine classes: they are as follows:—(1) that the subject of the suit is not within the jurisdiction

of a Court of Equity ; (2) that some other Court of Equity has the proper jurisdiction ; (3) that the plaintiff is not entitled to sue by reason of some personal disability ; (4) that he has no interest in the subject, or no title to institute a suit concerning it ; (5) that he has no right to call on the defendant concerning the subject of the suit ; (6) that the defendant has not that interest in the subject which can make him liable to the claims of the plaintiff ; (7) that for some reason founded on the substance of the case the plaintiff is not entitled to the relief he prays ; to these may be added (8) the deficiency of the bill to answer the purposes of complete justice, and (9) the impropriety of confounding distinct subjects in the same bill, or of unnecessarily multiplying suits.

Of these, the first is called a Demurrer for want of Equity ; the eighth, for want of Parties ; and the first branch of the ninth, for Multifariousness : the rest have no distinct names. Of the three just mentioned, which are those most commonly met with, the nature sufficiently appears from their name and description : as to the rest, we must refer to Mitford or the other works on pleading.

The forms of Demurrer for want of Equity, want of Parties, and Multifariousness, will be found in the Appendix, No. V.

The title to a demurrer, as the reader will have observed, gives the name of the Court and of the parties to the suit, and also the name of the document which follows : the demurrer itself then commences by a protestation of the falsehood of the statements of the bill, which is intended to prevent the defendant being

concluded by the admission which, by demurring, he makes, *argumenti gratiâ*, of the truth of the statements of the bill: by it the defendant reserves to himself the right of denying these statements in any other proceeding, or in the same suit in case the demurrer be adjudged insufficient. A cause of demurrer is then stated, together with a general allegation of the existence of other grounds on which the bill is demurrable, after which the defendant prays to be dismissed out of the Court, having been paid his costs, and without making answer to the bill.

When a demurrer comes on for hearing, the defendant may raise any objection to the bill which could have been taken by demurrer, although that objection be not specifically pointed out: this is called demurring *ore tenus*, but the negligence of the defendant in omitting to call the attention of the plaintiff to the defect in his bill at the proper time will generally be punished in the disposal of the costs of the suit. [See 14th Cons. Ord. r. 1.]

A demurrer is usually drawn and must be signed by counsel: it is engrossed on parchment, and filed with the proper Clerk of Records and Writs; and notice of the filing must on the same day be given to the plaintiff's solicitor.

A defendant may demur alone to any bill at any time within twelve days after his appearance thereto. If, however, he wish to demur to a part only of the bill, and to plead to or answer the remainder, he has (if an answer have been required from him) twenty-eight days from the service of the interrogatories upon him or his solicitor, within which he may so demur,

plead, or answer, not demurring alone; and (if no answer have been required from him) he may put in such demurrer, plea, or answer (not demurring alone), at any time within fourteen days after the expiration of the time within which he might have been served with the interrogatories, had there been any, that is to say, at any time within thirty days after the service of the copy of the bill upon him. The time for pleading to or answering the whole bill is the same as above.

On receiving notice that a demurrer has been filed, the plaintiff's solicitor should procure a copy from the Record and Writ Office, and lay it, together with a copy of the bill, before his counsel, who will consider whether the bill is really open to the objection taken by the defendant. If so, he will amend the bill, which the plaintiff is at liberty to do on paying to the defendant twenty shillings for his costs: more will be said in the next chapter on the amendment of bills. But if the plaintiff consider that the demurrer is groundless, he must proceed to set it down, in order to take the judgment of the Court on the point: this must be done, if the demurrer be to the whole bill, within twelve days after it has been filed, as otherwise the plaintiff, unless within such twelve days he have served an order for leave to amend his bill, will be held to have submitted to the demurrer, and the defendant will be entitled to his costs. If, however, the demurrer be to part only of the bill, the plaintiff may set the demurrer down for argument at any time within three weeks from the filing thereof, or he will, in like manner, be held to have submitted to the de-

murrer, unless within such three weeks he have served an order for leave to amend his bill. The defendant may, if he please, set down the demurrer.

In order to procure the setting down of the demurrer, a petition is presented, on which an Order of Course will be granted, and the registrar in attendance will thereupon set down the demurrer. As to what is meant by an Order of Course, see the third section of the fifth chapter of our Second Part.

By setting down is meant that the name of the cause is entered at the bottom of a list kept in the Registrar's Office of the matters ready to come on before each branch of the Court; in this list, opposite to the name of each cause is marked the stage at which it is about to come on for hearing. A certain number of causes, usually twelve, are taken from the top of this list, and entered in the paper of matters to come on before the Court each day: but in the case of a demurrer, the Court will often grant an application that the cause may be advanced, that is, placed at or near to the top of the list, so that it may come on for hearing very soon: this is done, because demurrers may be put in merely for the sake of gaining time, and putting off the evil day of answering the interrogatories. Notice of the setting down is given to the other party by service of a copy of the order for that purpose.

When the demurrer has been set down, both sides instruct their counsel to appear upon the argument; the briefs consist of a copy of the bill and of the demurrer, and copies of the same papers must be supplied for the use of the Judge. No other documents

are necessary, for the demurrer merely demands the judgment of the Court whether the allegations of the bill support the plaintiff's claim to relief: and on this question, clearly, no extraneous matter can have any bearing.

When the day of hearing arrives, the cause is called on in its turn, and the counsel for the defendant urge their objections to the bill, usually reading through the whole of it: the plaintiff's counsel support it, and one of the counsel for the defendant replies. It has already been observed that use may be made of any objection appearing on the bill, although not expressed in the demurrer, but in all the argument, the allegations of fact contained in the bill are admitted as incontrovertible. This rule, however, is confined to allegations of fact, and does not extend to conclusions of law, which may for the sake of perspicuity be stated in the bill. Thus, if the bill is brought by a plaintiff in the character of personal representative to A., and state that A. died intestate, that letters of administration were granted to B., who by will appointed C., the plaintiff, his executor; that B. died, and his will was proved by C., "who thereupon became, and now is, the sole legal personal representative of the said" A.; here the bill would be demurrable, for want of showing that C. represents A., although an allegation be contained in it that C. now is the representative: this allegation, being a mere conclusion of law, not following from the facts stated, is not admitted by the demurrer: and the plaintiff is not at liberty to bring any evidence before the Court to prove the truth of the allegation, for instance,

that letters of administration *de bonis non* to A. had been granted to C.: this fact, if true, should have been stated in the bill. It is also settled that the defendant does not, by demurring to the bill, admit the truth of charges of fraud contained therein.*

After hearing counsel, the Judge will either overrule the demurrer or will allow it, with or without leave to amend. In the last case, if the demurrer be to the whole bill, the suit is at an end, and, in the absence of an order to the contrary, the plaintiff must at once pay to the defendant his costs of suit and of the demurrer. If a demurrer to part of a bill be allowed, the Court often gives the plaintiff leave to amend his bill, on payment of the defendant's costs. It will not often happen that a demurrer is allowed without leave to amend, except in those cases where the bill has been drawn with a view to obtain the decision of the Court on some short point of law, with as little delay and expense as possible. Thus if a doubt arise on the construction of a will, and in one view of it a particular person is entitled to the residue, and in the other view he is entitled to nothing, a bill may be filed by him against the executors and the other proper parties praying for an account of the residue: the bill would set out so much of the will as is necessary to show the point in question, and would make the usual allegations that the defendants had proved the will and possessed themselves of the personal estate of the testator: these allegations are sufficient to entitle the plaintiff to discovery and relief, supposing his construction of the will to be the correct one; otherwise, he

* See *Nesbitt v. Berridge*, 9 Jur. N.S. 1044.

has no interest in the residue, and of course is not entitled to any account of it. Hence the only point at issue can be fully decided on the hearing of a demurrer to the bill, and if the Court determine against the plaintiff's construction, it will allow the demurrer: here there clearly could be no object gained by giving leave to amend, and therefore the allowance will be simple.

But often when a demurrer is allowed, the plaintiff's counsel is able to suggest to the Court facts, the statement of which in the bill would cure the defect which has been pointed out; if so, leave to amend will generally be given, under which these statements can be inserted, and matters proceed *de novo*. On the general subject of amending bills we must refer the reader to the next chapter, and shall here only observe, that if a demurrer be allowed with leave to amend, it is considered an abuse of the indulgence of the Court if the plaintiff either strike out the statement of any fact which he knows to be true, or insert any statement which he knows to be false.

If the demurrer be overruled, the suit will proceed as though no demurrer had ever been put in; that is to say, if the defendant have demurred alone, he must put in his answer, if he have been served with interrogatories, unless he is in a position to put in a plea: the nature of pleas is considered in the next section.

On the hearing of a demurrer, the Court usually makes an order respecting the costs of it; otherwise, the costs are borne by the unsuccessful party.

A demurrer must be so framed as to rely only on

facts stated in the bill, otherwise it will be what is called a *speaking demurrer*, and will be overruled.

SECTION 2.

On Pleas.

We have seen that by demurring, the defendant asserts that the plaintiff, by his own showing, is not entitled to the relief he asks ; but it may happen that the defendant is acquainted with one or more facts, which do not appear in the bill, but which would, if there inserted, render the whole demurrable. Of these he cannot avail himself by demurrer, and yet it would be unjust if he should be put to the trouble and expense of answering, merely because the plaintiff had not pleased to state the whole truth on his bill, while there existed a short and simple answer to the claim : in such a case, the proper form to adopt for the defence is that termed a Plea. The principal grounds of pleas are distributed by Lord Redesdale into twelve classes, as follows : (1) that the subject of the suit is not within the jurisdiction of a Court of Equity ; (2) that some other Court of Equity has the proper jurisdiction ; (3) that the plaintiff is not entitled to sue by reason of some personal disability ; (4) that the plaintiff is not the person he pretends to be, or does not sustain the character he assumes ; (5) that the plaintiff has no interest in the subject, or no right to institute a suit concerning it ; (6) that he has no right to call on the defendant concerning it ; (7) that the defendant is not the person he is alleged to be, or does not sustain the character he is alleged to bear ; (8) that

the defendant has not that interest in the subject which can make him liable to the demands of the plaintiff; (9) that for some reason founded on the substance of the case, the plaintiff is not entitled to the relief he prays; (10) that the defendant has an equal claim to the protection of a Court of Equity to defend his possession, as the plaintiff has to the assistance of the Court to assert his right; (11) the deficiency of a bill to answer the purposes of complete justice; and (12) the impropriety of unnecessarily multiplying suits may be shown by way of plea: but the inconvenience which may arise from confounding distinct matters in the same bill, as it must be apparent on the bill itself, unless very artfully framed, can in general only be alleged by demurrer.

Of these the ninth class, called Pleas in Bar, are subdivided as follows: they are pleas of matter of record or as of record in the Court itself, or in some other Court of Equity; such are pleas of a decree or order of dismissal determining the rights of the parties, or of another suit pending between the same parties for the same matter: or they are pleas of matter of record or as of record in some Court, not a Court of Equity; such are pleas of a fine, a recovery, or a judgment at law, or sentence of some other Court: or lastly, they are pleas of matter in pais, which are principally pleas of a stated account, an award, a release, a will, conveyance, or other instrument controlling the rights of the parties, or a plea of some statute, as of the Statute of Frauds, or of Limitations, pleaded with the averments necessary to bring the matter in question within the particular statute.

It will be observed that all these classes consist of short allegations of fact, which is indeed essential to the nature of a plea, which may be described to be a short statement of fact, the insertion of which into the bill would have rendered it demurrable. Considering the bill as equivalent to a Declaration at Law, a Plea in Equity corresponds to a Plea at Law, by way of confession and avoidance, which confesses the truth of the declaration, but avoids it by showing new matter, which bars the plaintiff's right to recover. Pleas are not favoured in Equity, and considerable strictness is required in the mode of stating the matter; and any irregularity will cause the plea to be overruled. For the rules respecting each of these classes we must refer to Lord Redesdale's work, and to the 'Treatise on Pleas' by Mr. Beames.

In the Appendix, No. VI., will be found some specimens of pleas.

A plea is usually drawn, and must be signed by counsel: it is engrossed on parchment, and must then be signed and sworn by the defendant, except in certain cases where this signature and oath are dispensed with, an enumeration of which will be found in Lord Redesdale's 'Treatise.' The object of thus requiring an oath to the truth of the statements of the plea is to give the plaintiff some guarantee that the plea is not put in wantonly for the mere purpose of delay. This is secured partly by the signature of counsel, required both to a demurrer and to a plea, which shows that in his opinion the pleading is good in point of law; and in the case of a demurrer this is sufficient; but as a plea introduces new matter, some-

thing more is requisite to provide for the possibility of false statements of fact being laid before the counsel: this is guarded against by requiring a defendant to swear to the truth of any plea which he may wish to put in. It will be found on examination that the reason of this rule does not apply in the case of the exceptions to it above alluded to.

An account of the mode in which pleadings are sworn will find a more convenient place in the next Section.

The plea having been engrossed, and perfected, if necessary, by the signature and oath of the defendant, is taken to the Record and Writ Clerk, and by him is filed: notice of the filing is on the same day served on the plaintiff. The time within which a plea must be filed has been previously stated.

On receiving notice that a plea has been filed, the plaintiff should procure a copy of it from the office, and lay it before his counsel, together with full information as to the truth or falsehood of the matter pleaded. Now, in considering the plea, the first question will be, whether it is sufficient in law: that is to say, whether the insertion into the bill of the statement contained in the plea would render the whole demurrable. If the plaintiff think that it would not do so, his course is to *set down the plea for hearing*, of which the equivalent in common-law pleading is demurring to a plea by way of confession and avoidance. If the plaintiff think that the plea does satisfy this test, he must next ask whether the allegation is true; if not, he must *reply*, which corresponds to delivering a replication traversing the new

matter in a plea by way of confession and avoidance. If the allegation in the plea be sufficient and true, but the plaintiff can produce new matter which will avoid its effect, he must *amend* his bill, introducing, by way of pretence or otherwise, a statement of the matters contained in the plea, and also a substantive allegation of the new matter by which he avoids it: in such a case he would, at common law, reply by way of confession and avoidance, but such special replications are not now in use in Chancery, the purpose being sufficiently answered by the practice of amendment, as we shall see in the next chapter. Lastly, it sometimes happens that the matter of the plea is both sufficient and true, and that no sufficient answer exists to it; in such a case the plaintiff must *abandon his suit*, and pay the defendant his costs: this will but seldom happen, unless there has been a want of due diligence on the part of the plaintiff in making inquiries before commencing proceedings.

Of the four courses thus open to the plaintiff, the first only is peculiar to the case of pleas; the others are also adopted after answer, and will be more conveniently discussed in the next chapter: it being observed, however, that by replying to a plea, the plaintiff admits that it is sufficient in law, and cannot afterwards raise any question as to its sufficiency: and that if the defendant, after replication, fail to prove the truth of the plea, he will be compelled to give the discovery required, not by way of formal answer, including his own case, but by way of mere answers to interrogatories put for the purpose of eliciting it.

Upon the filing of a plea, either party may at once set it down for argument, but (whether the plea is to the whole or part of the bill) it must be set down within three weeks after the filing thereof; otherwise, and if the plaintiff does not within such three weeks either serve an order for leave to amend his bill, or by notice in writing undertake to reply to the plea, the plea will be held good, and the defendant will be entitled to his costs, and may, if the plea be to the whole bill, obtain, as of course, an order to dismiss the bill.

A plea is set down for hearing in the same manner as that already described in the case of a demurrer; and the Court will often give leave to advance it. The papers supplied to the Judge and counsel will be copies of the bill and of the plea, and on these the argument will proceed in exactly the same manner as on a demurrer to a bill embodying both documents: each side is at liberty to read any part of the bill or of the plea.

On the hearing of a plea, the Court usually pronounces one of the four following orders: that the plea be simply allowed; that the benefit of it be saved to the hearing; that it be allowed to stand for an answer, with or without liberty to accept; or that it be overruled. In the first case, which will be when the Court considers the matter of the plea sufficient in law, the plaintiff must either, by undertaking to reply, dispute the truth of the plea, or he must submit to have his bill dismissed with costs, unless the Court give special leave to amend.

In the second case, the Court thinks that so far as

appears the plea may be a defence, but that there may be matter disclosed in evidence which would avoid it, supposing it strictly true, which question the Court will not preclude. The plea will be allowed to stand for an answer whenever the Court thinks that, though the matter disclosed may be a good defence, yet it is not properly brought forward by way of plea, as, for instance, if it do not fulfil the condition of being a *short* statement of fact: for if the defence consist of several circumstances, it is not allowed to excuse the defendant from giving the discovery, and it should be adduced by answer. We shall see in the next chapter that *excepting* is the mode by which the plaintiff takes the judgment of the Court as to the sufficiency of the answers given to his interrogatories. If the plea be overruled, the defendant must proceed to put in his answer.

Other orders are sometimes made on the hearing of a plea: for instance, leave may be given to amend the plea, or to plead *de novo*.

Before dismissing the subject of demurrers and pleas, we may remark, as has been incidentally stated above, that either the one or the other may be put in to part only of a bill, while some other course is adopted as to the remainder. In such a case, the pleading is entitled "The Demurrer (or Plea) of the above-named defendant C. D. to so much of the said plaintiff's bill of complaint as prays," etc. Sometimes the demurrer or plea is put in to the discovery only. It has not been thought necessary to encumber the foregoing sketch with the constant repetition of the words, "so much of the bill as the demurrer extends

to," or the like. If any matters be inquired after by the interrogatories, which, if true as alleged in the bill, would invalidate the plea, it must be accompanied by an answer to these interrogatories, denying the correctness of the statements of the bill on these points.

SECTION 3.

On Answers and Disclaimers.

It is unnecessary to say much on the subject of disclaimers, which are not often in use: a disclaiming defendant alleges that he has not any right or title, legal or equitable, and that he does not and never did claim title to the subject matter of the suit. Of course, a defendant will not be allowed by disclaiming to avoid giving to the plaintiff any discovery which he may require. If a defendant being in a position to disclaim does disclaim, and have not been guilty of any improper conduct, the plaintiff usually pays his costs, and obtains the dismissal of the bill against him.

If a defendant does not wish to disclaim, and cannot avail himself of a plea or a demurrer, he has no choice but to give by his answer the discovery sought, and along with the answers to the interrogatories, he may state any facts which he intends to use at the hearing. In case no interrogatories have been delivered to him, he need not put in any answer unless he please; but he is at liberty to put in what is called a voluntary answer, containing merely such facts as are material to his case: and if the defendant, not having been required to answer, do not answer, he will be considered to have traversed the case made by the bill.

The defendant's answer is usually drawn and must be signed by counsel: the instructions for answer will consist of copies of the bill and interrogatories, with the defendant's answer to each interrogatory: these the defendant's solicitor must have procured from the defendant himself. These papers must be accompanied by any other documents necessary to disclose the case which the defendant means to set up.

The form and general nature of answers will be understood from the example given in the Appendix, No. VII.

It will be seen that the answer is entitled in a manner similar to the other pleadings of which we have given examples. The body of an answer is divided into paragraphs in the same manner as a bill; the earlier part generally consists of answers to interrogatories, intermixed with the statement of the defendant's own case. Towards the end, there is often a denial that the defendant knows anything about some of the matters interrogated upon, and in the same position, is often found some charge or conclusion of law which the defendant conceives that the foregoing matter supports: this is not in any way necessary, but it is convenient, as showing what the case is on which the defendant relies; and neglect thus to show this may have an injurious effect on the defendant's position, when the question of costs comes to be discussed. If the defendant think that the bill is demurrable, although he did not choose to take the objection in that form, it is usual for him to claim by answer the same benefit as if he had demurred to the bill: and if on the whole he thinks that no decree ought to be given

against him, he submits that the bill ought to be dismissed as against him with costs. It will be observed that answers are usually drawn in the first person of the defendant, in which form it is obligatory to draw affidavits.

At the foot of the main body of the answer is found the signature of the counsel, and after that the schedules, if any. These consist of statements of accounts, or lists of documents, or other such matters which could not be conveniently introduced into the body of the answer, but are merely referred to in it. At the end of all comes the signature of the defendant, and the jurat, or attestation of the fact that the defendant has sworn to the truth of the answer.

This oath and signature are in general essential to an answer; but they are sometimes dispensed with by consent, when the defendant is absent from England, in some place not readily accessible. The oath is taken either before one of the Clerks of Records and Writs, or the Clerk of Enrolments, or before one of the persons styled "Commissioners to administer oaths in Chancery," in England or elsewhere as the case may be, who are solicitors whom, on proof of their respectability, the Lord Chancellor has appointed to take such oaths. Moreover, provision is made* for the recognition by the Court of any oaths taken out of England, before any Judge or other officer having power to administer oaths within the dominion of Her Majesty, or before any British Consul or Vice-Consul out of these dominions: and sometimes answers are sworn before Commissioners specially ap-

* See 15 and 16 Vict. cap. 86, sec. 22.

pointed for the purpose. In every case, the jurat will express the circumstances and the character in which the person acts who administers the oath.

The form of the oath administered will be found after the specimen of an answer to which we have before referred, Appendix, No. VIII. It will be observed that this oath is not an absolute assertion of the truth of all the statements contained in the answer, but of the truth of those only of which the defendant professes to be personally cognizant, and of his belief of the rest: this consideration will be found to be important with reference to the expediency of filing a replication.

Any erasure or interlineation in the jurat is looked at with great jealousy, and in case a mistake has been made, it is better to strike through the whole, and rewrite it, rather than attempt any alteration: any alteration in any part of the answer after it has been sworn would be fatal, and therefore it is the practice to authenticate any alterations which may have been necessarily made before the swearing, by the initials of the person who takes the answer. Formerly answers were engrossed on parchment, and then filed: now they are printed in the same manner as bills, and a defendant may either swear to and file a printed answer, or may swear to and file an answer written bookwise on paper of the same size and description as that on which bills are printed. In the latter case he must, at the time of filing it, leave a fair copy with the Clerk of Records and Writs, who will examine the copy with the original, and return it with a certificate that it is fit for printing. The defendant

will then cause the answer to be printed from such certified copy. [See orders of 6th March, 1860.] Notice of the filing is on the same day given to the plaintiff.

If the defendant be required to answer, he should do so within twenty-eight days of the service of the interrogatories upon him : if not required, he has fourteen days from the time limited for the service of interrogatories upon him, which gives him thirty days in all from the time when the bill is served upon him.* The Judge at Chambers may, if he think fit, grant the defendant further time to answer. [See 15 & 16 Vict. c. 80, s. 26.]

When the answer is filed, the plaintiff should procure a printed office copy, which the defendant is bound to supply to him on demand, the plaintiff paying for such copy the amount of the stamp, (five shillings,) and fourpence per folio, according to the length of the answer. The plaintiff is also entitled to any additional number of printed copies of the answer (not exceeding ten) at the rate of one half-penny per folio.

We may observe that if two or more of the defendants have the same interest in the suit, they may join in one answer ; and if this can be done, it is generally necessary that they should so join : for if, in the event of the suit, costs are ordered to be paid to them, one set only will ordinarily be allowed, that is to say, not more than would have been due, supposing that they had joined in one defence ; this one set of costs is sometimes given wholly to one of the sever-

* 37th Cons. Ord. rules 4, 5.

ing defendants, and sometimes is divided between them.

SECTION 4.

Interrogatories for the Examination of the Plaintiff.

It may often happen that the plaintiff is acquainted with matters which are favourable to the defendant's case, and which do not appear on the bill, but which the defendant has no ready means of proving except by the plaintiff's own oath; in fact, the defendant may require discovery from the plaintiff. To obtain this, the defendant was formerly obliged to file what was called a cross-bill against the plaintiff, who by putting in his answer thereto gave the required discovery. This course involved unnecessary expense, and now the same object is accomplished by the defendant filing interrogatories for the examination of the plaintiff. This can be done at any time after the defendant has put in a sufficient answer.

The interrogatories are usually drawn and signed by counsel: they are preceded by a concise statement of the subjects on which a discovery is sought, which statement must, it is conceived, be confined to matters stated on the defendant's answer; for the defendant will not be at liberty to use facts which do not appear upon his answer, and hence he can have no need of a discovery on any other matters.

The interrogatories are engrossed on parchment, and filed in the Record and Writ Office: a sealed copy is then delivered to the plaintiff, who is bound to put in an answer; this answer will be printed* and will

* See 11th order of March, 1860.

be similar in form to the defendant's answer to the plaintiff's interrogatories, but will be confined to giving the discovery required, and will not contain new matter: if the discovery be not fully given, the defendant may except to the answer, and proceedings will be taken similar to those which a plaintiff takes to enforce a sufficient answer from the defendant, as will be described in the next chapter: no orders (except as above) have been issued to regulate the practice relating to these interrogatories, and a great deal of uncertainty exists as to several points.

It will sometimes happen that the defendant requires relief as well as discovery from the plaintiff, in respect of the matters in question in the original suit; in such a case a cross suit must be brought, and carried on to regular course. No prayer for relief can be appended to the concise statement.

CHAPTER IV.

ON THE PLAINTIFF'S PROCEEDINGS AFTER ANSWER.

FORMERLY bills were frequently filed merely for the purpose of obtaining a discovery in aid of an action at law between the same parties: in such a case, the object of the suit was obtained, as soon as a sufficient answer had been put in, and the defendant was then entitled to his costs. But such suits cannot now be often necessary; for by the Common Law Procedure Act of 1854, the parties in any cause may interrogate each other, and the common law Court will enforce the giving the required discovery, without any recourse being had to Equity.

Such bills were termed bills of discovery, not because they alone sought discovery, but because they sought discovery and nothing else.

But usually by obtaining the discovery, the plaintiff has only got one part of what he seeks: his next aim is to get a decree. With this object, a copy of the bill, interrogatories, and answer, are laid before the plaintiff's counsel, with instructions to advise on the sufficiency of the answer and further proceedings.

On perusing these papers, the first question that arises is whether the answer is sufficient; that is, whether it fairly gives answers to the interrogatories:

if not, the plaintiff should *except* to it, for insufficiency. But if the answer be sufficient, the next consideration is whether the plaintiff can with advantage introduce into his bill any new matter, by way of confession and avoidance of any part of the defendant's case: if so, this must be done by *amendment*. If the answer be sufficient, and no new matter occur which can be advantageously introduced, it remains to take the judgment of the Court on the truth and effect of the matters stated on the bill and answer. There are three ways of doing this: if the plaintiff is content to rest his case on so much of the bill as is admitted by the answer, and also to admit the truth of all the statements of the answer, he may set down the cause to be heard on *bill and answer*; if he wish to be able to support his bill, and to contradict parts of the answer by evidence, without putting the defendant to the expense and trouble of proving the whole of the answer, he must give notice *of motion for a decree*; finally, if he think it expedient to deny the truth of the answer *in toto*, he does so by filing a *replication*, which is equivalent to traversing or contradicting the defendant's case. We will discuss these three courses in order.

SECTION 1.

Exceptions to the Defendant's Answer.

We have already stated that excepting to the defendant's answer is the mode in which the plaintiff objects that the answer does not give full answers to the interrogatories. The objection is taken by filing a document in the office, the nature of which will be

understood by the perusal of the specimen given in the Appendix, No. IX.

The draft of the exceptions is usually prepared, and must be signed by counsel : it is then copied on paper, and filed in the Record and Writ Office, after which notice of the filing must be given to the defendant. Exceptions must be filed within six weeks of the filing of the answer, exclusive of vacations.

On receiving notice that exceptions have been filed, the defendant should obtain a copy from the office, and lay it before his counsel, together with the papers which served as instructions for the answer. If counsel should be of opinion that the answer is insufficient in the points excepted to, he will advise the defendant to submit and put in a further answer, in which case notice of the submission is served on the plaintiff, within eight days after the exceptions are filed, and the defendant is allowed fourteen days from the date of such submission to put in his further answer : if, however, the defendant's counsel think that the answer is sufficient, nothing need be done by the defendant until the plaintiff has taken his next step.

If eight days pass without the defendant serving a notice of submission, the plaintiff must proceed to obtain the judgment of the Court on the validity of the exceptions : this will be done by setting them down for hearing. For this purpose, a certificate is procured from the Record and Writ Clerk that the exceptions have been filed, and on this certificate being shown to the Registrar, he will set down the exceptions in the paper in such a position that they will come on to be heard at an early day : this speedy

hearing of exceptions, like the advancing demurrers and pleas, is ordered to prevent the abuse of the forms of the Court for the purpose of evading the putting in a full answer. Notice that the exceptions have been set down should be immediately served on the defendant. Exceptions to the first answer must be set down after the expiration of eight days, but within fourteen days from the filing thereof, unless in a case of election the plaintiff is required to set them down in four days, in accordance with rule 6 of the 42nd Consolidated Order.

After being set down, the exceptions will in due course appear in the daily paper of business, and be called on in turn. The papers to be furnished to the Judge and counsel at the hearing will be the bill, interrogatories, answer, and exceptions; the argument is begun by those who support the exceptions, who are followed by those who maintain the sufficiency of the answer: no reply is allowed. The Judgment of the Court is either that the exceptions be overruled, and that generally with costs: or that they be allowed, in which case a time is fixed for the defendant to put in a further answer.

The further answer must be put in within the time limited by the order allowing the exceptions: it must contain such matter as, when read in conjunction with the first answer, will give fair answers to the interrogatories, which were the subject of the exceptions: it will be drawn, sworn, and filed in the same manner as the first answer, and may be excepted to in like manner, if the plaintiff think it open to the same objection: the exceptions must

be set down the second time within fourteen days from the filing of the further answer: in the notice of setting down such exceptions, the plaintiff must specify the particular interrogatories on which he means to insist.

To prevent a defendant evading the giving the discovery, by putting in an endless succession of insufficient answers, it is the practice for the Court, after a third answer has been held insufficient, to order the defendant to be examined on interrogatories as to the points required, and to stand committed, until he shall have fully answered, which committal, as we shall see hereafter, would be followed by deprivation of property. If the defendant be abroad, and thereby avoid arrest, or if he please to remain in prison, and lose his property, rather than answer, the discovery cannot be obtained: the Court has given the plaintiff all the assistance in its power, and can do no more.

If the exceptions are overruled at the hearing, the plaintiff must proceed with his case as best he can on the answer that has been put in.

SECTION 2.

Amendment of the Bill.

There are two objects with which bills are amended: either it is necessary to correct mere slips, to bring the bill to the form in which, but for some mistake or oversight, it would originally have been drawn; or, it is necessary to introduce statements altogether new, on account of the case made by the defendant by plea or answer, or of events which have occurred since the filing of the bill.

We have seen that amending the bill on account of new matter alleged by the defendant by plea or answer is equivalent to the common law replication by way of confession and avoidance. A bill can be amended at any time before the suit has been set down on bill and answer, or notice of motion for a decree has been given, or a replication has been filed, and even after one of these stages has been attained, if circumstances be shown which render it proper; but the most important amendments are generally those introduced in consequence of the answer of the defendant, and therefore we select this place for treating of the whole subject.

The amendments may be made either by striking out parts of the bill, or by the insertion of new passages; they may be made in any part of the bill, in the parties, in the body, or in the prayer, the only restriction being that they must not be such as to cause an entire change in the nature of the suit.

It does not seem necessary to give any example of the mode of making amendments: the bill as amended will be in all respects similar to an original bill, but will bear a second signature of counsel.

An order of the Court for leave to amend is necessary, before the amendments can be made: this order may, at any time before answer, be obtained without notice to the other side, and within four weeks after the answer is sufficient (if the plaintiff have not filed a replication,) an order to amend may be obtained *of course*: at any other period of the suit the order can be obtained only on notice to the defendant, unless the amendment be required for the mere purpose of recti-

fyng clerical errors in names, dates, or sums, in which case an order to amend may be obtained, without notice to the defendant, at any time before the hearing. Unless some special time be named in the order, the plaintiff has fourteen days from the date of the order within which he may make his amendments.

If the amendments introduced into the bill in any one place exceed two folios, or one hundred and eighty words, it is necessary to reprint the bill as amended; otherwise it is sufficient to write the alterations with a pen in the margin of the original bill, or on the paper with which it is interleaved. If a reprint have been made, a copy of the bill is taken, together with the order, to the Record and Writ Clerk, by whom it is filed; but if the alterations are in writing, they will be made by the Record and Writ Clerk in the copy originally filed, on his being furnished with the draft alterations and the order. Copies of the bill, as amended, are then served on the defendants, who may be interrogated, and may put in answers, in the same manner as to the original bill.

In the case of defendants to the amended bill who have already answered the original bill, the interrogatories need extend only to the amendments: but defendants introduced into the suit by amendment may in general be interrogated as to the whole bill.

The general orders of the Court make various provisions with regard to the costs of amendments, with a view to prevent unnecessary expense being wantonly incurred, and to secure the payment of all necessary expenses by the party who in justice ought to bear the same.

Leave is sometimes given to amend an answer, or more commonly to file a supplemental answer, to supply defects in that originally filed ; this, however, is not often done.

SECTION 3.

Hearing on Bill and Answer.

When a sufficient answer has been put in to the bill, and no amendment is made, the pleadings contain all the facts on which the judgment of the Court is to be given. The mode of obtaining this judgment will vary, according to the extent to which the plaintiff is ready to admit the truth of the answer. And first, if he thinks that, even treating the answer as incontrovertibly true, and abandoning so much of his bill as is not admitted by the answer, he will yet be entitled to the decree he seeks, he may set down the cause to be heard on bill and answer. This course was frequently adopted under the old practice, in the case of friendly suits, where the pleadings would be drawn with the express view of stating all the facts on which the decision was required : but now, in such cases, it is far more usual for the plaintiff to give notice of motion for a decree, and the setting down a suit on bill and answer is nearly obsolete.

SECTION 4.

Motion for a Decree.

The mode most frequently adopted by the plaintiffs for obtaining the relief which they seek is by moving for a decree. This kind of motion must be distinguished

from ordinary motions, which are interlocutory applications, may be made at any stage of a suit, and repeated any number of times : they are fully treated of in the Second Part. The practice of moving for a decree was introduced by the Jurisdiction Act of 1852 : the motion cannot be made more than once, and that not until the time for putting in an answer shall have expired, nor after a replication has been filed.

If the plaintiff determine to move for a decree, he must give one lunar month's notice of his intention to the defendants ; the form of the notice will be found in the Appendix, No. X.

At the same time that the notice is given, the motion for decree should be entered with the Registrar : this is done by obtaining from the Record and Writ Clerk a certificate that the cause is in a fit state to entitle the plaintiff to move for a decree, that is to say, that all the defendants have appeared, and have put in answers, or have neglected to do so for the prescribed time. This certificate is taken to the Registrar, with a memorandum of the time of giving the notice of motion : the motion will then be set down in the Cause List, will appear in due time in the daily paper of business, and will be called on in turn. If the state of business be such that the cause would appear in the paper before the expiration of one month from the service of the notice of motion, it will be kept back until that time has expired.

If the plaintiff and defendant agree to accelerate the suit, by having it heard before the month has expired, they can do so : and if the matter can be heard as a short cause, a decree can by consent be obtained

very speedily. By a short cause, is meant one which is coming on for hearing at any stage, and the disposal of which will probably occupy not more than about ten minutes. In such a case, if the plaintiff wish the hearing to be accelerated, he obtains from his counsel a certificate that the matter is, in his opinion, proper to be heard as a short cause: on this certificate being produced to the Registrar, he will transfer the cause from the general paper to the paper of short causes. Days are appointed at frequent intervals for hearing these short causes, and then all are disposed of which up to that time have become ready for hearing. In this manner a decree may often be obtained against a friendly defendant in two or three days from the filing of the bill; for the defendant may appear as soon as the bill is filed: no interrogatories need be served: the defendant may waive his time for putting in a voluntary answer, and the month to which he is entitled between the notice and the motion for a decree: the cause is thus at once in a fit state for hearing, and may be set down on the same day.

At the foot of the notice of motion for a decree will be seen a list of the affidavits intended to be used by the plaintiff at the hearing: these must therefore be filed before the notice of motion is given, and if such motion be made after an answer has been put in, the answer will, for the purposes of the motion, be treated as an affidavit. If the plaintiff wish to read on his behalf any portion of the answer, he should state in his notice of motion that he will read "such portions of the answer as he shall be advised;" otherwise, by proposing to read the whole, he may perhaps be taken

to have admitted the truth of the whole. The defendant must file his affidavits in answer within fourteen days from the giving of that notice, and must furnish the plaintiff with a list thereof; and the plaintiff has seven days to file his affidavits in reply: no other evidence than that of these affidavits can in general be used at the hearing. The reader is referred to the next chapter for an account of the nature of and mode of filing affidavits, and for a statement of the facts which it is necessary to prove at the hearing.

SECTION 5.

Replication.

Cases sometimes occur where the plaintiff cannot with prudence move for a decree, by which, as before observed, he allows the defendant to make use of the answer at the hearing, without however precluding himself from controverting the statements contained in it. In such cases the plaintiff must reply to the answer, which course is analogous to traversing it, and is technically called "joining issue," and then the defendant is compelled to prove the matters contained in it *de novo*, and cannot make use of what he has already sworn. He may, however, file a short affidavit, simply re-swearing his answer, and then use it as evidence. (See Appendix, No. IX.) A replication may be filed at any time after all the defendants have appeared and put in their answers, or the time for answering has expired: it may be filed even after notice of motion for a decree has been given, provided no decree has been pronounced thereon. If a replication be filed in a case where no answer has been

required, and none has been put in, its nature differs somewhat from other cases: we have seen that if a defendant shall not have been required to answer, and shall not have answered, he shall be considered as having traversed the case made by the bill: here then a replication is not a traverse of any new matter adduced by the answer, for there is none such; but it is rather a joining issue on the traverse of the bill implied in the omission to answer. In such a case a replication is never filed, except in the event of the Court in its discretion declining to make an order on motion for decree.

A plaintiff may have the cause heard in a different manner against different defendants, that is to say, he may have it heard on bill and answer against one, and may reply to another, and so on: the form of replication usually expresses the manner in which the suit is to be heard against each defendant, as will be seen by referring to the form as given in the Appendix, No. XI. This form is engrossed on parchment, and filed with the Record and Writ Clerk, and notice of the filing is served on the defendants.

It will often happen that a cause is in such a state that a replication can be filed against one defendant long before it can be filed against another; but a replication can be filed once only in each cause: in such a case, the first has a right to be put out of his suspense, and can compel the plaintiff to "undertake to reply," by which the plaintiff binds himself to file a replication at the earliest opportunity. For the mode of enforcing this, we refer the reader to what is said on "motions to dismiss" in the next Part.

Steps have recently been taken to introduce trial

by jury into the Courts of Chancery, and otherwise to assimilate the hearing of causes in those Courts to trials in Courts of Common Law ; for by 21 and 22 Vict. cap. 27, it is provided that the Court of Chancery may direct any question of fact arising in any suit to be tried by a special or common jury, or before the Court itself without a jury, the witnesses in the latter case being examined in open court, and the Judge delivering the verdict. And now the "Chancery Regulation Act, 1862" (25 and 26 Vict. c. 42) has made the trial in the Court of Chancery of questions of law or fact arising in suits *the rule*, and the Court is bound to try them (with or without a jury), unless it be satisfied that the administration of justice in the particular suit will be more promoted by a trial at common law.*

Moreover, by the orders of the Court issued on February 5th, 1861, the plaintiff, or any defendant, may within fourteen days after issue has been joined, apply to the Judge in Chambers for an order that the evidence in chief as to any facts or issues may be taken *vivd voce* at the hearing of the cause, and should the Judge make the order, the examination in chief, cross-examination, and re-examination will be had in open Court accordingly. The evidence, may, however, still be taken as heretofore, before one of the examiners of the Court, or a special examiner, if the parties to the suit shall so agree, and shall signify such agreement by writing, signed by them or their respective solicitors, and filed at the Record and Writ

* *Young v. Fernie*, 1 De Gex, Jones and Smith, 355 ; *Baylis v. Watkins*, 7 Law Times, n.s., 843 ; *Egmont v. Darell*, 1 Hemming and Miller, 563 ; *Re Hooper*, 11 Weekly Reporter, 130.

Clerks' Office. These orders were made in pursuance of an Act of Parliament (23 and 24 Vict. c. 128), passed for the express purpose of enabling the Lord Chancellor and the Chancery Judges to make general rules and orders, with a view of carrying into effect the recommendations of the Chancery Evidence Commission, which was appointed in 1859.

Where the plaintiff has filed a replication, the evidence in chief on both sides (except in cases where it is taken *vivâ voce* at the hearing) must be closed (that is, the affidavits must be filed) within eight weeks after issue is joined, unless the time be enlarged by special order, but a further period of fourteen days is allowed for the cross-examination of a witness who has made an affidavit, or has been examined "*ex parte*" before the Examiner of the Court. On this head the reader is referred to the 19th Rule of the Orders of 5th February, 1861.

We have seen that, on motion for decree, the defendant has in his hands the whole of the plaintiff's evidence before he is required to adduce his own: this gives an opportunity for a knavish defendant to shape his case in such a manner as to meet that which he knows to have been made by the plaintiff: but after replication, neither party need file his affidavits until the last day of the eight weeks, and thus no opportunity is given for such a practice as that above suggested: this is a reason which may sometimes make it a more eligible course to reply than to move for a decree. Moreover, if a replication be filed, it will be found that a defendant cannot avail himself of his own oath in support of his case, without exposing himself to cross-examination.

When the time for taking the evidence has expired, or earlier if the defendant consent, the cause may be set down for hearing by the plaintiff: this will be done by obtaining from the Record and Writ Clerk a certificate that the cause is in a fit state to be set down for hearing, which certificate is taken to the Registrar, who will set down the cause.

It is not sufficient to serve on the defendant notice that the cause has been set down: a writ called a subpoena to hear judgment must be issued and served. The form of this writ is given in the Appendix, No. XII.

When the cause is set down, the Registrar gives a note of the day on which the subpoena is to be returnable, which is usually one month after the day of setting down: as the interval between the teste or date and the return must be one month; it is commonly necessary to issue the subpoena on the day of setting down. A form of the writ is obtained at the law-stationer's and filled up: it is then taken to the Clerk of Records and Writs, together with the Registrar's note, and with a *præcipe* or memorandum of what it is that the Clerk is required to do: the writ is sealed, and the note and *præcipe* filed. Copies are then made of the writ, and it is served upon each defendant by delivering one of the copies, and at the same time showing the original.

After having been set down, the cause will come on in its regular order, as before mentioned with respect to a motion for a decree. In a proper case, a cause may after replication be heard as a short cause.

CHAPTER V.

EVIDENCE.

THIS Chapter will contain what it seems necessary to say on the subject of the evidence to be used in different proceedings in Chancery. On most applications to the Court it is necessary to produce evidence of the facts on which the application is based, and we shall in the first place point out the mode of determining what facts in each case it is necessary to prove : having done this, we shall explain the two modes in which evidence can be taken, orally or by affidavit. This chapter will therefore be divided into three sections.

SECTION 1.

Evidence of the Pleadings.

The use of the pleadings in Equity as well as at Law is to bind down the parties to certain definite statements of the facts on which they rest their case, and of the parts of their adversary's case which they dispute. We have seen how each party has an opportunity afforded him of putting on the record a statement of all the facts which he considers material for the purpose of answering the case made by his adversary, and also of recording his denial of those state-

ments of his adversary the truth of which he does not choose to admit: hence there is no hardship in a rule which says that no one shall be allowed to controvert at the hearing any facts which he has himself stated on the record, nor any facts put on the record by the adversary of which he has chosen to admit the truth. When expressed in technical language, this rule is identical with saying that at the hearing each party may make use of his adversary's pleadings, and of so much of his own as his adversary has admitted. Evidence must be given of all facts not stated or admitted by the passages which this rule allows to be read by the party to whose case they are essential, and to contradict such of the statements of the opposite party as have not been admitted. It will be remembered that if a defendant have not been required to answer and have not answered, he will be considered to have traversed the case made by the bill.

We will now apply this principle to the three several modes in which causes are brought before the Court with a view to a decree. And first, of hearing on bill and answer; here the plaintiff may read against each defendant any part of his answer, for it is the adversary's case, and he may also read such parts of his bill as are admitted by the answer: the rest of the bill, that is, all parts which the defendant by answer either denies or, what is equivalent, professes ignorance upon, cannot be proved at all: for the form of proceeding by bill and answer does not admit of the production of evidence. Each defendant in like manner may read the whole of the bill, for it is his adversary's case, and also the whole of his answer, for

it is not contradicted by the plaintiff. It is clear therefore that the proceeding on bill and answer cannot be often used with advantage against a hostile defendant.

On a motion for a decree, the state of the pleadings is the same as on a hearing on bill and answer, and the passages which may be read are therefore the same. But on such a motion evidence may be used: that adduced against each defendant by the plaintiff will therefore extend to prove such parts of the bill as are not admitted by the answer of that defendant, and also to contradict the statements contained in the answer: that adduced by each defendant will be in aid of the answer (if any), in substantiating the statements contained in it, and generally in meeting or contradicting the statements in the plaintiff's affidavits.

By filing a replication against any defendant, the plaintiff denies the truth of the answer of that defendant, and therefore precludes him from reading it. Hence, after replication the plaintiff can read the answer, for it is his adversary's case: and he can also read so much of the bill as is admitted by the answer: the evidence therefore which he must adduce is the same as on motion for a decree. But the defendant can read nothing but the plaintiff's bill, and is therefore obliged not only to disprove such parts of this as he has not admitted, but also to prove his whole answer by evidence. When the statements of the answer relate wholly to the defendant's own acts or defaults, he is in a position to swear absolutely to the truth of the answer, and not merely in the limited form in which he has already sworn to it (see the form given

in the Appendix, No. VIII.) : in such a case the defendant may even after replication obtain an order allowing him to read the answer as an affidavit : or he may make a short affidavit referring to the answer, and verifying the statements of it : this course, however, exposes him, as will be seen in the third section, to be cross-examined by the plaintiff, and such an order as that just alluded to will not generally be granted unless the defendant submit to the same liability.

There is one exception to the rule that a defendant is not allowed to read his answer after replication ; and this is, when the question is discussed as to how the costs of the suit are to be borne. In this question there may be, and often is, an opposition of interests between two defendants ; and each defendant is at liberty to read his answer, not only as against the plaintiff, but also against his co-defendants. If the plaintiff desires to read the answer of one defendant against another, he must give notice to the latter.

It will be understood that no party is obliged to read any part of his own or his adversary's pleadings : subject to the rules above given, he may read as much or as little as he pleases : he will not however be allowed to read part only of a passage, but will be obliged to give to the adversary the benefit of any explanation or discharge which may be incorporated in the same passage with some admission ; if he omit to do so, the adversary may himself read such explanation or discharge.

The rules which have been given in this section are generally spoken of as the evidence of the pleadings ;

the pleadings, however, are not used strictly as evidence, but rather as admissions limiting the points on which evidence is required.

SECTION 2.

On Oral Evidence.

We have already seen that after replication has been filed in a cause, the evidence may, if an order of the court be obtained for the purpose, be taken *vivâ voce* at the hearing; also that the parties may agree to have it taken before an examiner orally. An important alteration (to be mentioned at the end of this section) has recently been made in the mode of taking evidence before an examiner, but as the old practice may be followed, if the parties agree, or if the Court think fit to order that it be followed, it is still necessary to explain it.

If then a party wish to procure the testimony of any witnesses, he takes a copy of the bill and answers to the office of the Examiners in Rolls Yard. These officers are two in number, and divide the various suits between them, according to the first letter of the surname of the first plaintiff, in the same manner as is done by the Clerks of Records and Writs. The Clerk of the proper Examiner will, in return for the bill and answers, give an appointment, or notice of the time when the examination can be taken, and also notices addressed to the witnesses and signed by the Examiner, requesting their attendance at the appointed time. Sometimes the state of business in the office is such that it is impossible to obtain an appointment, except

for a day so distant as seriously to prejudice the case of one of the parties ; or the witnesses may, from infirmity or other circumstances, be unable to attend in London : in such cases some private person, usually a barrister, is appointed by the Court as special Examiner to take the depositions, and he will give the appointment and notices.

If there be reason to suspect that any witness will neglect to attend at the time appointed for the examination in the notice sent to him, a writ of *subpoena ad testificandum* must be served upon him : the form of this writ will be found in the Appendix, No. XIII.

A blank writ is procured at the law-stationer's, filled up, and taken with a *præcipe* to the Record and Writ Clerks' Office, where it is sealed and the *præcipe* filed : it is then served on the witness in the usual manner, and at the same time the reasonable travelling expenses of the witness are tendered to him. If, after this, he neglect to attend or to account satisfactorily for his absence, he will be liable to be committed for contempt.

After the appointment has been obtained and the attendance of the witnesses secured, notice of the time of taking the evidence is served on the other parties.

At the appointed time, such of the parties as please attend before the Examiner, by their solicitors or, in important cases, by their counsel : the witness is then sworn and examined, cross-examined and re-examined in the same manner as upon a *Nisi Prius* trial. The answers are taken down in writing by the Examiner himself, in the form of a continuous narrative in the first person of the deponent ; but any parti-

cular question and answer may, in the discretion of the Examiner, be taken down verbatim. If any question be objected to by the parties, the objection, with the Examiner's opinion thereon, is noticed in the depositions; and if the witness demur to, that is, object to answer, any question, the question and ground of demurrer are taken down by the Examiner, and transmitted by him to the Record and Writ Office: the validity of the demurrer will then be decided by the Court.

When the examination is concluded, the depositions are signed by the Examiner, and transmitted to the Office of the Record and Writ Clerks, where they are filed. Any party is then able to procure copies of any part of the depositions of his own or his adversary's witnesses. This is an important alteration on the practice in use up to the year 1852: under it, the depositions were taken privately by Commissioners appointed for the purpose, upon written interrogatories, drawn by the parties for the examination and cross-examination of the witnesses: the depositions, so taken, were transmitted secretly to the office, and it was not allowed to procure copies of them until the time of taking evidence had expired, or, as it was expressed, publication had passed. At the present day, the evidence of witnesses who are out of the jurisdiction may be taken before Commissioners by interrogatories, or by a special Examiner in the usual manner.

It is now ordered (by Rule 6 of the Orders of the 5th February, 1861) that in the absence of any agreement by the parties, or any order of the Court, to the contrary, all examinations taken by the Exa-

miners of the Court, or by any special Examiner, shall be taken "*ex parte*" in the presence only of the party producing the witness, and every such examination shall at the hearing be treated as an affidavit. This order is most important, as it destroys the publicity of oral evidence. The law as to the privileges and competency of witnesses, and as to the mode in which particular facts or documents are to be proved, is in general the same in Equity as at Law.

SECTION 3.

Affidavits.

Affidavits are used for the purpose of proving or disproving the statements on which any application to the Court is grounded in every case, except at the hearing of a cause in which a replication has been filed, and the evidence has been taken orally; and even when the evidence has been so taken, yet leave may in a proper case be obtained from the Court to use affidavits at the hearing to prove particular facts and circumstances. It will be remembered that every examination taken *ex parte* before an Examiner, will at the hearing be treated as an affidavit.

We thus see that affidavits occupy a principal place in a Chancery suit; they may be described as written statements on oath; it follows from their nature that they must be made voluntarily, and that no means exist to compel an unwilling witness to make an affidavit. Before the year 1852, this sometimes occasioned a defeat of justice; for a fact essential to the plaintiff's case might be only in the knowledge of some

person, who from hostility or from a wish to avoid the appearance of partisanship, refused to make an affidavit, and who yet had not such an interest in the matter as would enable the plaintiff to make him a party to a suit, and compel him to put in an answer : in such a case, the plaintiff had no means of proving the fact on any interlocutory application, as for an injunction, and thus a long delay occurred before the plaintiff could have that assistance of the Court to which he was entitled, and of which the utility in a great degree depended on its being obtained with speed.

To remedy this, the Court is now empowered, on special application, to allow use to be made on all occasions of evidence taken orally ; and persons are compellable, in such a case, to attend on a subpoena, at the Examiner's Office, and give evidence, in the same manner as with a view to the hearing of the cause.

. A solicitor who wishes to obtain an affidavit from any person first ascertains what the deponent is prepared to swear to ; he then puts this into a regular shape, and, if necessary, the draft is settled by counsel : the solicitor then ought to go through it with the deponent, to make sure that the contents are such as he can swear to. The deponent afterwards attends before one of the Commissioners to take oaths in Chancery (who should not be the solicitor in the cause), and, having signed the affidavit, swears that the contents are true : the Commissioner then signs a jurat, which is appended. The practice with regard to swearing affidavits abroad is the same with what has been already described with regard to answers.

The affidavit, when sworn, is taken to the proper Clerk of Records and Writs, who satisfies himself of the genuineness of the signature to its jurat, and files it: an office copy is then made, on the application of the party who filed it, which office copy alone is the document on which the Court acts, except in certain urgent cases during the Long Vacation, when the offices are not open: in these the Court will act on the original affidavit. When it is wished to make use of an affidavit before an office copy can be made, a plain copy may be presented to the clerk, and, if satisfied of its accuracy, he will mark it as an office copy. Office copies of written affidavits will now, however, seldom be used except on interlocutory applications, such as motions for an injunction, or the like; for by the General Orders of May, 1862, it is provided that the evidence in suits shall be printed under the direction of the Clerks of Records and Writs; and application to have the evidence printed may be made by any party to the suit (whether issue be joined or notice of motion for a decree be served) as to affidavits, after the times respectively allowed for filing such affidavits, and as to depositions taken on the oral cross-examination of the witnesses who have made affidavits, after such depositions shall have been filed. Every party who files an affidavit or causes depositions to be taken, is to take from the Clerks of Records and Writs a printed copy of every affidavit filed by him, and of all such depositions, for which he is to pay twopence per folio. This will be the office copy.

Any person who has made an affidavit is liable to

be cross-examined and re-examined orally, in the manner described in the last section.

There are certain affidavits, with which every party ought to be provided at every hearing before the Court, but which do not tend to throw light on any of the matters at issue, and will be of no use unless the other side make default. For if the party who wishes to put the Court in motion be present when the case is called on, but the other party be absent, no order can be made unless it be shown that the moving party has done what the laws of the Court required him to do, in order to secure the attendance of the other party: if this be done, then the absent party may fairly be presumed to be content to submit to any order to which the Court may think the mover entitled, after hearing his own statement of his case. The mover should therefore go into Court prepared with an affidavit to prove the service on the other parties of the notice of motion, subpoena to hear judgment, or other document which the nature of the proceeding may require. And the other party should likewise be prepared to prove that he has been served with the same document: for if he can do so, he may claim the costs of his attendance from the defaulting mover who has required it. To enable the person who effected the service of the document to make this affidavit, it is usual and proper, at the time of the service, to make a memorandum of the fact and circumstances: indeed, as we have said, by the rules of the Courts of Common Law, this is, in some cases, obligatory.

When it is wished to prove documents by affidavit,

it is done by showing the original to the deponent at the time of swearing, which original is then, for the sake of identification, marked with some letter of the alphabet, and a memorandum is indorsed on it and signed by the person before whom the oath is taken. This original is thenceforth called an exhibit, from the Latin *exhibere*, "to produce or show," because the document is produced and shown to the deponent. Every statement in an affidavit must show the means of knowledge of the deponent, and at the foot of the affidavit must be written a memorandum stating by whom the same is filed. Such memorandum shall be in the following form :—"This affidavit is filed on the part and behalf of the plaintiffs" or "of the defendants M. or N.," or as near such form as possible.*

The example given in the Appendix No. XIV. will show the form of affidavits, and the manner of proving exhibits.

* See the 18th and 23rd Rules of the Orders of 5th Feb. 1861.

CHAPTER VI.

THE HEARING AND DECREE.

THIS Chapter will contain two sections : in the first, the proceedings on the Hearing of a Cause will be described ; the second will treat of the form, nature, and consequences of the Decree.

SECTION 1.

The Hearing.

The cause having been set down will appear in the paper, and in its turn be called on for hearing. The plaintiff should furnish, for the use of the Judge, copies of all the pleadings and evidence in the cause, and the brief given to his counsel should contain the same documents. The brief furnished to the counsel for each defendant consists merely of so much of the pleadings and evidence as can be read by or against that particular defendant : that is, of the bill and replication, if any, and the answer of that defendant, together with the plaintiff's evidence, and that adduced by that defendant. No defendant has any concern with the answers or evidence of his co-defendants, unless the plaintiff has given him notice of his

intention to read the answer of a co-defendant against him.

Two counsel are usually engaged by each party, one of whom is commonly a Queen's counsel: but both the number and the standing are entirely optional, and in cases of more than ordinary length or importance, the employment of three, or even of four, can be justified. It will sometimes happen that two conflicting interests in the subject of the suit may be centred in one individual,—as, if he claim one in his private character, and the other in his representative capacity; in such a case, different counsel may be employed to support each interest. For instance, if a doubt arise between B. and C. as to the construction of A.'s will, and B. die, leaving C. his executor: in a suit instituted to settle the true construction, it would be the duty of C., the executor, to instruct counsel to oppose the view which is upheld by the counsel for C. the individual. The same counsel may appear for two or more parties, not only when they are jointly interested, but even when their interests are entirely distinct, so long as there is not any conflict between them.

The argument is opened by the plaintiff, who is followed by the defendants in the order in which they appear on the record, unless any of them happen to be in the same interest with the plaintiff, in which case they immediately follow him: when all the defendants have been heard, the plaintiff has the right to reply. If the Court think that the plaintiff has not in his opening made any *prima facie* case, the application is dismissed without hearing the defendants at

all ; and similarly, if the arguments of the defendants have not raised any doubt in the mind of the Court, no reply is called for. We shall see in a future chapter, that the question as to the costs of the suit is not usually disposed of at the hearing ; but when it is so, the argument upon it takes place, after the decision has been given on the main point. At the conclusion of the argument, the Court pronounces its opinion, of which the heads are taken down by the registrar whose turn it is to attend the Court, and also by the various counsel on the backs of their briefs : the heads so taken down form the original material from which the decree is afterwards framed.

It often happens that there can be no doubt as to the decree to which the plaintiff is entitled ; in such case, it may be arranged beforehand by the parties, after which the cause is marked as short, and counsel merely appear and give their consent on behalf of their clients.

If the case be such that it is not expedient to allow the facts to become public, it will be heard by the Judge in his private room, to which only the solicitors and counsel engaged will be admitted : in this case, the judgment will sometimes be given in public, especially when it involves any important question of law, and does not turn upon the facts as to which secrecy is desirable.

SECTION 2.

The Decree.

A Decree, as distinguished from an Order, is the

sentence of the Court delivered on the hearing of the cause, and not on any interlocutory application, and thus it corresponds to a Judgment at Law, as distinguished from a Rule : but as the greater part of what we shall here say concerning decrees will apply with little or no alteration to orders, we shall include these latter under the name of decrees. When a bill is dismissed at the hearing, this is not done by decree, but by an order of dismissal : mention is sometimes made of a decretal order, which seems to be an order made on motion or otherwise not at the regular hearing of a cause, and yet not of an interlocutory nature, but finally disposing of the cause, so far as a decree could then have disposed of it : such would seem to be the orders made on motion for decree, and also orders directing preliminary inquiries in certain cases, where the Court will not consider the main question in the suit, until it knows, by a certificate of a chief clerk, what is the state of the facts. These distinctions are of no practical importance, and we shall not further advert to them, but shall apply the word "decree" to every formal expression of the judicial will of the Court.

On turning to the Appendix, the reader will find some specimens of decrees and orders. See No. XV.

We have seen that the registrar who attends in Court each day takes down in his book the heads of the decree pronounced in each cause : the counsel also take down the same, according to their understanding of it. Immediately after the hearing, the plaintiff or other party who may be moving in the proceeding, takes to the Registrar's Office his senior

counsel's brief, with its indorsement, and also all the papers which were or might have been used as evidence at the hearing: the party who takes this proceeding is said to have the carriage of the decree, and it is sometimes a matter on which the Court gives a special direction, that the carriage be given to some party other than the one to whom it falls naturally.

The registrar compares his note of the decree with that indorsed on the brief, and if he find them agree, he considers whether all the necessary evidence has been left with him, and if not, he proceeds no further until it is left. Then he draws up the minutes of the decree, which consist of the substance of the decree itself, in a shape far more formal than the notes on the briefs, but wanting the commencement which is found in the final form of the decree: this difference will be best understood by comparing the full form of one decree with the minutes of others, as given in the Appendix.

It will be readily understood that the minutes contain all the substance of the decree, which can afterwards be framed from them by an operation little more than mechanical: the names of the parties appearing, and of those against whom an order was taken on affidavit of service, as well as a note of the evidence to be entered on the decree, though forming no part of the minutes, are generally prefixed to them: copies of the minutes thus prepared are delivered out from the Registrar's Office to all parties that apply, and a day is fixed for settling them. On the day appointed all parties that please attend by their solicitors before the registrar, at the office, and he pro-

ceeds to settle the minutes: if any question arise as to the proper form, the cause is put in the paper, "to be spoken to on the minutes," and the Court thereupon explains what was the exact decree pronounced.

Thus, finally the minutes are settled; frequently the parties agree among themselves as to the minutes, which are sometimes drawn by counsel, and these minutes are then at once adopted by the registrar. The decree is drawn up from the minutes by a clerk in the office, and is perused by the registrar in the presence of such of the parties as please to attend: if found correct, he *passes* the decree, by placing his initials in the margin at the end.

When passed, the decree is left with a clerk in the office for *entry*, and is by him entered or copied in the registrar's book. This book contains an authentic copy of every decree made by the Court; and since, up to the year 1833, every decree was prefaced by a recital of the pleadings, the whole formed a report of the cause, to which appeal is often made when a doubt arises on the accuracy of the report cited from a printed volume. Under the present practice, the entry shows nothing but what order was made, and on what evidence it was founded, so that its usefulness as a report is much less than formerly; still, however, the registrar's book is often referred to on points of form.

At the beginning of every Michaelmas Term, two books are provided for the entry of the decrees to be pronounced during the year then commencing,—one to contain those to be pronounced in causes where the first letter of the surname of the first plaintiff is found

in the earlier half of the alphabet ; and the other, to contain those belonging to the latter half. Any particular decree is quoted by the folio of the book in which it is found : thus an order made in the case of *Powell v. Matthews*, is found in Reg. Lib. B, 1854, f. 1423, or on the 1423rd folio of the second volume of the annual book commencing in November, 1854 : probably this particular order was pronounced in 1855, and possibly in the October of that year.

On consulting the forms of decrees and orders referred to, it will be found that they are divisible into four parts, of which one is sometimes absent : these are, the title of the cause, and the date ; the proceeding in which the decree is made, and the evidence on which it is founded ; the declarations of right, if any, and the ordering part. Of these in order.

The title, as given in the heading of the decree, contains not only the names of the parties themselves, but also of the guardians of any defendants who are infants or idiots or lunatics. The date is that of the day on which judgment was actually delivered, which is occasionally not till some days after the hearing, time having been taken by the Judge to consider what decree should be made.

After the date is stated the proceeding, whether the hearing, or motion or petition, or otherwise, on which the decree is made ; and also whether it be made in the presence of all parties, or in the absence of some, and whether the absent parties have been served with the proper notice or otherwise : then is entered the evidence on which the decree is founded, which should include all that each party might have read, provided

he do not wish to exclude it : for instance, when a bill is dismissed without hearing the defendants, they have had no opportunity of reading any evidence, but yet they are entitled, if they please, to have entered on the decree what they might have read : and this is important with reference to the prospect of an appeal ; for if an appeal be brought and dismissed, it will generally be dismissed with costs to be paid by the appellant ; if, however, on the appeal, the respondent use evidence which was not used on the hearing below, each party will often be left to bear his own costs : and the Court of Appeal cannot look to anything but the decree to ascertain what was used on the former occasion.

The next part of a decree, which, as we have said, does not by any means always occur, is the declaration of right : it will be readily seen that this is equivalent to the finding of a jury on an issue between the parties, or of the Court on a demurrer at law, while the ordering part which follows is analogous to the judgment at law which follows on the verdict and assessment of damages. A declaration of right contained in a decree operates as an estoppel between the parties, in the same manner as a judgment at law : and also, the Court would interfere by injunction to restrain any proceedings by one of the parties inconsistent with the declaration. For instance, if a suit be instituted to carry out the trusts of a will of real estate, and the heir be made a party, he has a right to an issue to try the validity of the will : if he waive this right, or if the issue be decided in favour of the will, a decree will be made declaring that the will is well proved : by this declaration the heir is

estopped from denying the validity of the will, and yet, if he commence an ejectment, the devisee would have no opportunity at law of pleading the estoppel; hence it would be necessary to have recourse to Chancery for an injunction, unless the devisee were prepared to risk the verdict of a second jury, on such evidence, including the decree, as he could produce of the execution of the will and the sanity of the testator.

The most frequently occurring species of declaration of right, which corresponds to a judgment on a demurrer at law, is that by which the Court declares what is the true construction of written instruments, and particularly of wills: such declarations are exactly equivalent to the answers given to the questions appended to a Special Case, as will be seen in our Third Part.

After the declarations of right, if any, comes the ordering part, which is itself occasionally wanting, when the decree is said to be merely declaratory: this part directs the doing of such acts as are necessary to give the plaintiff such relief as he is entitled to have on that particular occasion. These acts are sometimes the payment of money, or the execution of deeds, or the like: but more frequently, on the hearing the cause is referred to the Judges' Chambers, to take accounts, make inquiries, or the like, in order to ascertain the facts of the case. The nature of the proceedings thus directed by decrees will be discussed more fully in the First and Second Chapters of our next Part.

When a decree has been passed and entered, it is looked upon as sufficiently perfect to be the ground of

further proceedings, either in pursuance of it, or for enforcing the doing of the acts ordered ; and it cannot be altered, except as to obvious errors, without a regular rehearing : obvious errors can still be corrected on petition. But there are some purposes for which it is necessary to go through a further ceremony, called the Enrolment of the Decree. This we must proceed to describe.

Any decree or order of the Court may be enrolled, which is not in its nature merely interlocutory : if it be in its nature final, it may be enrolled, although made not on the hearing of the cause, but on motion or petition : thus, a decree made on the hearing of a foreclosure suit, which is not absolute until confirmed by a further order, is not a subject for enrolment ; while an order dismissing a bill for want of prosecution, though made on motion, is yet sufficiently final in its nature to be enrolled.

The party wishing to enrol a decree makes a copy of it, preceded by a statement of the prayer of the bill, and some other details ; this copy is called the Docquet, and is left with the Record and Writ Clerk, together with the original decree : he compares them, and if he find the docquet correct, he procures the signature of the Lord Chancellor to it, and then copies the docquet and signature on parchment rolls : the docquet and engrossment are preserved in the office. In Rolls causes, the signature of the Master must be procured to the docquet before it is left at the office.

The enrolment must be effected within six months from the date of the decree : after that time, the leave

of the Court is necessary, which will be granted unless any party can show a reason to the contrary.

The enrolment of a decree has two distinct effects: it cannot when enrolled be varied by the simple and cheap process of rehearing, but it is necessary to have recourse to the House of Lords, or to file a bill of review: in fact, the House of Lords will not entertain an appeal from a decree which has not been signed and enrolled. Moreover, if a second bill be brought for the matter disposed of by the decree, this decree may after enrolment be pleaded in bar of the second suit, whereas it cannot be so pleaded while yet unenrolled.

The effect of enrolment on the right of appeal makes it important that some means should be provided of preventing parties enrolling their decree, as soon as they learn that a rehearing is intended before the Court of Appeal: for this purpose, any party has a right to lodge in the Record and Writ Office a caveat, or notice to the officer not to enrol the decree. After this has been lodged, notice will be given of any application to enrol the decree affected: the caveat must then be "prosecuted with effect" within twenty-eight days from the leaving the docquet at the office.

The presentation of a petition of appeal will not of itself stop the enrolment: the order for setting down the appeal must be actually served before the docquet is left, or within twenty-eight days after, in case a caveat have been lodged.

The Lord Chancellor has jurisdiction to vacate any enrolment, which he will exercise when the enrolment

appears to have been procured by any kind of irregularity, or with circumstances of surprise or bad faith : thus, if one party were about to lodge a caveat, and the other told him that he need not go to the expense, for they would not enrol, and nevertheless the latter did proceed to enrol the decree, no doubt the enrolment would be vacated.

The expense of enrolment is considerable, and therefore it is never resorted to without some special reason : hence a very small proportion of the whole number of decrees pronounced will be found in the enrolment office.

Every decree ordering some act to be done must mention how long a time from service of the decree the party has for doing it. To enforce the decree, a copy is made with an indorsement in a fixed form (see the Appendix, No. XVI.), mentioning the consequences of disobedience : the decree is then served on each party ordered to act, by showing the original and delivering to him a copy. For the consequences of non-compliance with the direction of the decree, the reader is referred to the Chapter on Contempt.

PART II.

COURSE OF A SUIT AFTER DECREE AND INCIDENTAL PROCEEDINGS.

IN the first Part we have traced the regular steps by which a defendant in a suit is compelled to give the discovery required of him, and by which a decree is obtained against him. In some cases this decree may put a complete end to the suit, as when a bill is dismissed without costs, or when a merely declaratory decree has been sought: but this can rarely happen, for there will generally be some costs to be paid by one party to another, even if nothing more remain to be done: and in a large proportion of cases, the event of the various proceedings taken under the decree is of the utmost importance with reference to the substantial success of the suit. We shall in this Part treat briefly of the ordinary course of some of the more usual of these proceedings, which, as we have seen, are very various in their nature.

Moreover, we have hitherto confined ourselves to the *regular* course of the suit, that is, the simplest and most direct by which it is conceivable that the object

of the suit could be obtained. But it is probable that in the great majority of suits this regular course is not taken without the intermixture of certain incidental proceedings, having the object, either of facilitating this regular course, where it is impeded in any particular case; or of obtaining, where the rules of the Court allow it, some part of the relief at an earlier period than it could otherwise be obtained, or of correcting some error supposed to have been committed by the Court in its decision on any question brought before it; or lastly, of obtaining payment by the proper parties of the costs of the suit.

The principal of these incidental proceedings will be discussed in this Part, which will be divided into ten Chapters, as follows :—(1) Proceedings under the Decree; (2) Proceedings in Chambers; (3) Further Consideration; (4) Supplement and Revivor; (5) Motions; (6) Petitions; (7) Contempt; (8) Particular Persons; (9) Appeal; (10) Costs.

CHAPTER I.

PROCEEDINGS UNDER THE DECREE.

WE have seen how various are the directions contained in decrees, and that they generally include references to Chambers: these will be treated of in the next Chapter, and at present we shall confine ourselves to some less usual but still very common proceedings. Of these, the principal are paying money or transferring stock into or out of Court, and sending issues to be tried in a Common Law Court: and first, of the payment of money into Court.

Whenever the plaintiff can read from the defendant's answer a clear admission that he holds a definite sum of money upon trust, the plaintiff is entitled to have this money brought into Court, and can even compel its payment by the summary proceeding of motion, as soon as the answer has been filed, without waiting till a decree has been obtained; and if at the hearing the plaintiff can prove the existence of the trust and the amount of the trust fund, a similar order will be contained in the decree: and frequently an order is made for payment of the sum to which a trust fund shall be ascertained to amount on taking the accounts. The Court has jurisdiction also to make an order of this nature on the plaintiff; and in some cases, as

that of an interpleader suit, the bill regularly contains a submission on the part of the plaintiff to pay in the sum which is claimed from him by the defendants. The same remarks apply to the transfer of stock into Court. The principle upon which the Court acts is to secure all trust moneys from any possible danger of misapplication, as far as possible without risk of interfering with any rights of persons in possession, and against whom no charges of misconduct are brought. The payment or transfer into Court does not in any degree affect the rights of the persons beneficially entitled to the fund, which is afterwards distributed among them according to their respective interests.

Every order for the payment of money into Court should mention the day on or before which the payment is to be made, and also the particular account, if any, to which it is to be placed. Before the appointed day, the party who is to make the payment attends in the proper department of the Accountant-General's Office, and hands in the order directing the payment; in a day or two he receives a direction to the Bank of England to receive the money: that bank acts as bankers to the Court, receiving money on the direction of the Accountant-General, and paying it, as we shall hereafter see, on the cheque of that officer, in whose name all the money and stock stands. The direction must be taken to the bank when the payment is made, and a receipt will be given by the bank clerk, which must be taken back to the Accountant-General's Office. Proof of the payment having been made can be given by obtaining an office copy of this receipt, and of the certificate of the Accountant-General.

When stock is to be transferred into Court, the proceedings are similar to those just described.

When money has been paid into Court, it is often ordered to be laid out in the purchase of stock, so as to give the parties entitled the benefit of interest; and when this direction does not form part of the order under which the payment is made, yet it is frequently given on the petition of any person interested: it is generally the duty of trustees to see that their *cestuis que trustent* do not suffer through their money lying in Court unemployed. The order directing purchase of the stock may order payment of the dividends to be made to any person, or it may order them to be invested, in the purchase of like stock, so as to accumulate at compound interest. In default of an order otherwise disposing of them, the dividends will lie idle in the bank.

Money or stock brought into Court to the credit of any suit or matter is placed to some particular account, which is named in the order directing the payment or transfer: the title of this account expresses shortly the source from which the money is derived, or the persons to whom it belongs: thus, if it belong absolutely to one person who is an infant or otherwise under disability, it will be placed to the credit of the suit, "The account of A. B., an infant," or otherwise, as the case may be. Sometimes the title of the account expresses that the fund is liable to legacy or succession duty, the object being to prevent any mistake being made when the fund is applied: it is the duty of the Accountant-General to take care that these duties are satisfied before any money subject to them leaves his hands.

When money or stock is standing to any account in a suit or matter, it cannot be dealt with except upon notice to all persons interested who are parties to the suit: but it oftens happens that persons are interested who are not parties, as particularly when a mortgage or sale is made of a fund in Court: in such a case the mortgagee or vendee should procure a stop order, the nature of which is described in a subsequent Chapter, Part III. Chap. 3, Sec. 2.

When money is to be paid or stock transferred out of Court, the order directing the payment is taken to the Accountant-General's Office, where, after a day or two, a cheque for the amount will be given on attendance of the proper person: generally the payment is directed by the order to be made to the person actually entitled for his own benefit, who must be identified by a solicitor: but if the payment be made for costs, it is made directly to the solicitor, his being the hand ultimately entitled to receive it: and often, money is ordered to be paid to the solicitor on his undertaking to see to the application of it, where several small sums have to be paid, and the expense of the attendance of all the claimants at the office would be considerable. The cheque is countersigned in the office, and then taken to the bank, where, if presented within one month, it will be paid to the person named or his order.

It often happens that before the main question in a suit can be disposed of, a decision must be obtained on some previous and subsidiary question, either of law or of fact. When such a question of law arose, it was formerly the practice to state it in the form of a case, and send it for the opinion of a Court of Law: the case was argued before this Court, and a certificate returned of the opinion of the Judges: this power was taken away by the 61st section of the "Jurisdiction Act," but the Judges in Chancery have the power to call in the assistance of a Common Law Judge,* who hears the argument in the Equity Court, and gives his opinion on a question submitted to him by the Equity Judge. The recent Act (25 & 26 Vict. c. 42) which provides for the trial by or before the Court of Chancery of questions of law or fact arising in suits, contains an express clause preserving the right of the Chancery Judges to call in a Common Law Judge to aid in deciding questions of law. With regard to questions of fact, the Court of Chancery is now bound either to decide them without the aid of a jury, or to summon a jury, under the power conferred by the statute (hereinbefore mentioned) of 21 & 22 Vict. c. 27. Probably the Court will feel bound to order a jury to be summoned, if any party to the suit require it, and at any stage of the suit; for although, under the old practice, the Court did not usually direct an issue at law until it had heard the cause, still it had jurisdiction to grant an issue upon an interlocutory application; and it would hardly be consistent with the recent improvements in the speed of Chancery pro-

* 14 & 15 Vict. cap. 83, sec. 8.

cedure to require the evidence to be taken in the usual way with a view to a hearing, and then to have to take it again before a jury.

It frequently happens that the plaintiff in a Chancery suit must establish his legal right before he can obtain relief in a Court of Equity; thus, if a bill be filed to restrain the infringement of a patent, the plaintiff may be required to prove the validity of the patent, before he can sustain his suit; in such a case, the question of validity will (instead of being tried by action at Common Law) be put into the form of an issue, and tried before the Equity Judge (with or without a jury).

A further important addition to the powers of the Court of Chancery is conferred by the 2nd section of the above Chancery Jury Act, by which the Court, in all cases where it has jurisdiction to entertain applications for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for specific performance of any covenant, contract, or agreement, is empowered to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct. The regulations made by the Judges with reference to proceedings under the Act will be found in the 41st of the Consolidated Orders, rules 26—52.

The issuing of particular writs is sometimes directed by the decree, but as this is more usually

done on motion, we shall say no more about it in this place. When an injunction has been issued on motion, it is sometimes *made perpetual* by the decree: the effect of this direction is that the injunction can then be discharged only by a proceeding of solemnity sufficient to reverse the decree: as long as the writ depends simply on an order made on motion, it can be discharged by another motion.

A class of cases remains to be noticed in which the Court is applied to for the performance of functions resembling those of an arbitrator: as in the case where a partition of lands is sought by one of several owners. Here the decree will order a commission to issue to persons appointed by the various parties to the suit, directing them to divide the land in question into lots, according to the interests of the different parties: the commissioners accordingly make the allotment and return the commission, whereupon the Court directs mutual conveyances of the several portions, by which the partition is completed.

The proceedings in suits for settlement of boundaries and for assignment of dower are generally similar to the above.

The Court will sometimes make a decree for partition at once, without the expense of a commission, on being satisfied by the affidavits of surveyors that the proposed partition is fair and proper. For a form of such a decree, see 3 Sm. and Giff. 18.

CHAPTER II.

PROCEEDINGS IN CHAMBERS.

HITHERTO we have not spoken of any proceedings taken before a Judge, except while sitting in Court: but the larger portion of the business of the suitors is transacted out of Court, in the Chambers of the Judges: of the mode of carrying on this business we propose to speak in the present Chapter.

The business done in chambers is of two kinds: one is the making of orders in cases which are so simple, or involve property of so small an amount, that it is expedient to avoid the expense of a hearing in Court: the other is business which is little more than ministerial, such as the taking accounts and making inquiries directed by decrees. These two classes of business will be treated of in the two Sections of the present Chapter.

SECTION 1.

Ministerial Business.

It is observed in the treatises on Equity Jurisprudence that a great part of the jurisdiction of the Court of Chancery arose from the facilities which that Court

presented for the determination of matters of account, which facilities consisted not merely in the power given to the plaintiff to obtain a discovery on the oath of the defendant in aid of proof of the items, but also in the existence of machinery better adapted than that of a jury to determine on the multitude of questions of fact which necessarily arise in taking a long account. From these causes, the Courts of Equity were supported in their assumption of jurisdiction in every case of complicated accounts; and now, in order to support a bill seeking to have an account taken in Equity, it is unnecessary to show any ground of equitable interference, beyond the mere fact that the account is too complicated to be conveniently disposed of in an action at Law for the balance. Moreover, there are very few suits of any kind in which it is not requisite to take accounts, in aid of the main object of the suit: so that a very great amount of business of this kind has to be disposed of. It is also frequently necessary to make inquiries as to the members of a family, or the expediency of dealing with property in a particular way, or as to other points on which the Court requires to be satisfied before the rights of the parties to the suit can be finally determined. Thus, all the ministerial business of the Court comes under the two heads of accounts and inquiries, which are carried on by the Chief Clerks in pursuance of directions from the Judge; and it is usual to pray in almost every bill that, for the purposes previously mentioned, all proper directions may be given, accounts taken, and inquiries made, though this general form should not be considered sufficient to pre-

clude the necessity of indicating in the prayer the specific matters as to which accounts and inquiries are anticipated.

The Chief Clerks to whom this business is confided are nine in number, three being attached to the chambers of the Master of the Rolls, and two to each of the Vice-Chancellors. They are appointed by these Judges respectively, by virtue of the Act of Parliament passed in 1852* for the abolition of the office of Master in Chancery: before that year, the ministerial business of the Court was transacted by the Masters.†

The Chief Clerks of each Judge attend at his chambers daily, except during vacation: the business is divided between them by the first letter of the surname of the first plaintiff. A daily list of the cases to be disposed of by each is made out and hung up outside the door of the chambers.

In order to procure the taking of the accounts directed by any decree, the party having the carriage of the decree (*i. e.* usually the plaintiff) takes a copy of it to the chambers of the Judge to whose Court the cause is attached, the copy having indorsed upon it a certificate of its correctness signed by the solicitor: this copy so carried in is the foundation of all the subsequent proceedings in chambers.

* 15 & 16 Vict. c. 80. Every Chief Clerk (unless he has been a Clerk to one of the Masters) must be a Solicitor of ten years' standing at the least: on being appointed, he must procure himself to be struck off the roll of Solicitors. See also 27 & 28 Vict. c. 15.

† By order of Court, dated the 23rd August, 1860, all matters then pending before the Masters were transferred to the Judges.

On receiving this copy of the decree, the clerk will mention what is the earliest day and hour at which he will be disengaged, so as to be at liberty to proceed with the business ordered by the decree: the time appointed is entered in a book, called the Summons and Appointment Book, and a summons is issued, returnable at that time.

A summons is the document by which all parties concerned are required to attend at chambers when any matter is to be gone into: its form is prescribed by 35th Cons. Ord. r. 2, and will be found in the Appendix, No. XVIII.*

The form there given is that used when the object of the application is to enter on the taking accounts under a decree: but in every case the particular object sought must be shortly stated.

When a summons is to be issued, two copies are taken to the chambers, when one will be filed and the other sealed by the clerk, who at the same time will make an entry in the Summons and Appointment Book: copies of the summons are then made for service, which is effected by delivering a plain copy and at the same time showing that bearing the seal: there should be at least seven days between the service and the return, and if through any cause the service cannot be effected in time to leave that interval, the day of the return will be altered on an application for that purpose in chambers, and a new day indorsed, the indorsement being authenticated by the seal.

On the arrival of the time appointed, the parties attend either personally or by their solicitors, counsel

* See also Schedule K, appended to the Consolidated Orders.

not being heard in chambers before the Chief Clerk, and the first thing to be done will generally be to fix a time for the accounting parties to bring in their accounts: the length of time allowed for this will of course vary with the nature, length, and complexity of the matters in question. On the arrival of the appointed time, the accounting party makes an affidavit verifying the statements of an account which is annexed to the affidavit as an exhibit, and this is brought into chambers. In the last edition of Mr. Daniell's 'Chancery Practice,' and in many other books, will be found specimens of accounts as practically used in chambers, and it has not been thought necessary to reproduce them here. It will be observed that the items on each side of each account are numbered consecutively.

When the account has been brought in, any party interested may give notice to the accounting party of any errors which he may think the account to contain, accompanying such notice with a concise statement of the grounds of his objection: the chief clerk afterwards at the appointed time goes through the account with reference to these objections, and may allow or disallow them, as he thinks right, on consideration of the evidence brought before him, either orally or by affidavit. The account is of course looked upon as conclusive against the accounting party, and therefore the objections will consist of additions to the items on the one side, and of striking out or diminishing items on the other side. Even when no objection is made by any party, vouchers must be produced for every payment above £2, subject to a

power vested in the Court to order, in a proper case, that books of account be taken as *prima facie* evidence of the truth of their contents : this power is very sparingly exercised.

When the chief clerk gives his decision on each point, the corresponding alterations, if any, are made in the account ; and finally, if the alterations are considerable, a transcript is made of the whole as altered.

These proceedings have been described as taking place before the chief clerk, as in fact is usually the case : but any party has a right to require that any particular question be disposed of by the Judge in person ; and for this purpose the Judges sit daily in chambers, after the termination of their Court business : the abuse of this power of applying to the Judge is prevented by the discretion exercised in the disposal of the costs of the hearing. Counsel may be heard before the Judge in Chambers, but as a rule the business in Chambers is conducted by solicitors.

The result of the account thus taken is finally embodied in a certificate by the chief clerk, which is signed and adopted by the Judge in the same manner as a certificate giving the result of inquiries directed to be made by a decree. To these inquiries we will now direct our attention.

The inquiries which are most frequently prosecuted in the Judge's chambers are those directed by decrees for the administration of the estates of deceased persons ; such as inquiries after creditors, legatees, next-of-kin, heirs-at-law, encumbrances affecting property, and the like. In the latter class of inquiries, suffi-

cient evidence to satisfy the chief clerk can usually be produced by affidavit, but in the case of an inquiry after creditors, next-of-kin, or other unascertained classes of persons, it is usual also to issue an advertisement, which is inserted in the 'London Gazette' on a copy being produced at the office bearing the signature of the chief clerk, and is also inserted in the usual manner in some other newspapers, where it is most likely to be seen by any of the parties sought after. It will be seen that by the terms of the advertisement for creditors (the form of which is given in the Appendix, No. XIX.), all who do not come in by a certain day will be excluded from the benefit of the decree: this means that, if they do not make their application until after that day, they may find that all the assets have been distributed among other creditors, who will never be compelled to refund what they have once received: but if the assets are more than enough to pay in full all the creditors who do come in, so as to leave a surplus divisible among volunteers, such as legatees or next-of-kin, these will be compelled to refund proportionately whatever may be necessary to pay in full creditors who subsequently prove their debts. A similar rule applies to advertisements for next-of-kin, and the like.

Creditors applying under such an advertisement as that above referred to, enter their claims at chambers in the Summons and Appointment Book, and file an affidavit verifying the amount of their demand. If the amount claimed be under £5, and no party object, the creditor need do nothing more, and in due course he receives the money, with interest at £4 per

cent. from the date of the decree, and with £2. 2s. added for costs of proof: but if he claim more than £5, or receive notice that some party objects, he must attend on the appointed day, and substantiate his demand by evidence. It is the duty of the party having the carriage of the proceedings to satisfy himself that the affidavit filed amounts to a *prima facie* proof of the validity of the demand.

Another ministerial function performed in chambers under a common administration decree consists in carrying out the direction that the property be applied in payment of the debts and legacies in a due course of administration: this payment is usually made by the executor or administrator, out of the balance in his hands, and the amount paid is allowed him in his accounts.

Another matter of great importance, to which we can only allude here, is the sale of estates, which may be ordered at any stage of any suit; and which is commonly ordered in every decree for the administration of realty, conditionally on its appearing to be necessary through the insufficiency of the personal estate for payment of the debts of the deceased. A full detail of the mode in which a sale is effected will be found in the third chapter of the thirteenth edition of the 'Treatise on the Law of Vendors and Purchasers,' by Lord St. Leonards. It will here be sufficient to say, that the title to the estate is investigated and the conditions of sale are drawn by one of the conveyancing counsel to the Court: a reserved bidding is fixed for each lot by the chief clerk, and the sale is effected by an auctioneer in the usual way:

the purchaser is entitled to the same abstract of title and conveyance as in ordinary cases: and the result of the sale being certified to the Court, an order is made that on paying his purchase-money into Court the purchaser be let into possession, and the conveyance executed by all proper parties. Even after the result of the sale has been certified, it is competent for any person to apply to have the estate again put up to competition, on his offering a large increase over the price at which it was actually knocked down: this is termed opening the biddings.

Reference has just been made to the conveyancing counsel to the Court: these are barristers, at present six in number, who having been practising as conveyancing counsel for not less than ten years, are selected for the post by the Lord Chancellor: to these gentlemen in rotation is referred all business in the nature of conveyancing which comes before the Court.*

When everything has been done in chambers which is directed by the decree, the result is embodied in a certificate by the chief clerk, to which are annexed, by way of schedule, the accounts on which it is founded. The nature of this certificate will be best understood by consulting the example given in the Appendix, No. XX.: it will be seen that it gives generally only the gross balances of the accounts, but that when necessary any special circumstances will be stated. The certificate also contains a short statement of the evidence on which the chief clerk grounds his finding.

* See 15 & 16 Vict. c. 80, s. 41.

The certificate is settled and signed by the chief clerk in the presence of all parties, after which it must be signed by the Judge. This will be done without investigation after the lapse of four days, unless in the mean time any party express his intention of applying to the Judge to vary any point in the certificate: the parties had the same opportunity of taking the Judge's opinion when the point was originally before the chief clerk, but if they please they may wait until the whole certificate is completed, after which and within four days they may apply to the Judge, who will give his decision and either at once sign the certificate or direct the chief clerk to vary it, as the case may require. When the certificate has been signed by the Judge, it is forthwith filed, and any party wishing to vary or discharge it must apply, by summons or motion, either at chambers or in Court, within eight clear days after the filing.*

Occasionally an order directs payment out of Court of a sum of money of which the amount is uncertain at the date of the order, but which can easily be ascertained, such as if it be a sum of interest up to the day of payment: the amount of this is calculated by the chief clerk, and a certificate signed by him is acted upon by the Accountant-General, without the delay of four days necessary to obtain the signature of the Judge.

We have said that, as a rule, counsel do not appear at chambers: the chief exception to this rule is when sometimes a pressing matter arises in vacation respect-

* See 15 & 16 Vict. c. 80, s. 34, and 35th Cons. Ord., rule 52.

ing which an application would be made in open Court, if the Court were sitting: in such a case, the Judge will hear the application in any convenient place, and for this purpose his chambers are often chosen, where therefore counsel will attend. But this is not what is technically called a hearing in chambers, and it will often be had at the Judge's private residence, whether in London or the country.

Whenever, therefore, as frequently happens during proceedings at chambers, points arise, in the taking the accounts, of great importance, and requiring to be argued in the fullest manner, they must be adjourned into Court, which will be done on any party satisfying the Judge that the case is a proper one. The names of the causes to be so heard appear in the list of business for particular days, as adjourned summonses. The facts on which the question arises are embodied in the form of a case, which is furnished to the Judge and counsel, and the argument proceeds in the usual way, the Judge giving directions to the chief clerk according to the conclusion to which he comes. This is considered generally the best and cheapest course to adopt when circumstances render a hearing in Court necessary.

Appeals can be brought from decisions in chambers in just the same manner as from decisions in Court: but cases of sufficient importance to be the subject of an appeal are generally of importance enough to be fully considered by the Judge below, and therefore ought to have been adjourned into Court: and a practice exists of adjourning matters into Court *pro forma* when the Judge has come to his

decision in chambers,* and it is intended to take the point before the Court of Appeal.

SECTION 2.

Judicial Business in Chambers.

We have in the last Section described the mode in which the chief clerks investigate matters submitted to them, and embody the result of their investigations in a certificate which is approved by the Judge, and which is in all subsequent proceedings taken to be incontrovertibly true, unless a motion be made or summons taken out to vary it; but, besides this business, the chief clerks frequently make orders of the same nature as orders made in Court: to these we must now direct our attention.

We have not yet met with any expression of the judicial will of the Court, except decrees: it will, however, readily be understood that matters frequently require to be decided in the course of a suit both before and after decree, which decisions are termed orders: these are generally made on motion or petition, which modes of proceeding will be treated of in subsequent Chapters, where more will be seen of the nature of these orders.

But orders may also be obtained, in certain cases, by summons in chambers, and when this course is possible it ought to be pursued, inasmuch as it is the cheapest course: the extra costs of any more expensive proceeding would have to be borne by the party in fault.

* See *York and North. Midland Railway Company v. Hudson*, 18 Bea. 73, and 'Smith's Chancery Practice,' sixth edition, 548-9.

The applications which ought to be made at chambers are specified in Section 26 of 15 & 16 Vict. c. 80, and in Rule 1 of the 35th Consolidated Order; we can only here say, that in any case where a party wishes to obtain a longer time for taking any step relating to his pleading or evidence than is allowed for the purpose by the general rules of the Court, he must apply in chambers for an order giving him the requisite leave. So also, if a plaintiff wish to amend his bill, he must apply for an order at chambers: except that he can obtain one such order before and one after answer, by motion or petition of course: this, as will be seen hereafter, is a simpler and cheaper proceeding than even that in chambers.

Moreover, orders are made at chambers for payment out of Court of sums not exceeding £300, and for payment of dividends amounting to less than £10 per annum: and also in a great variety of other cases, connected with the conduct of suits and the management and sale of estates under orders of the Court. One class of applications, however, that for the production of documents, is of such importance as to call for a more extended notice.

A principal branch of the right to discovery which a plaintiff has in Chancery has always consisted in the right to the production of any documents in the possession of the defendant, which may be material for the support of the plaintiff's case. In order to ascertain whether any such documents exist, and if so what they are, it has always been usual, though it is not now necessary, to introduce into almost every bill a charge that the defendant has in his possession

or power divers documents relating to the matters in question in the suit : and on this charge is founded an interrogatory requiring the defendant to give a description of all such documents, which is accordingly done by the answer. Before the recent alterations in the practice, the plaintiff moved the Court for an order that the defendant should produce any documents of which he had, by his answer, admitted the possession ; but now the application for such an order should be made at chambers.

For this purpose a summons is taken out, of which the form expresses the object of the application, and is served on the defendant. If a sufficient admission of the possession and description of the nature of the documents appear upon the answer, the order will be at once made : but if the answer do not show these particulars, or if no answer have been put in, an order will be made that the defendant within a limited time make an affidavit* in a prescribed form, stating what documents he has or had in his possession or power, and that within a limited time after the filing of such affidavit, he produce and leave with the Clerk of Records and Writs the documents mentioned in such affidavit, except such as he shall object to produce : the plaintiff may then inspect and take copies of all the documents so produced. The plaintiff often takes out a summons for production of documents as above, without interrogating the defendant as to their possession. (See 15 & 16 Vict. c. 86, s. 18.)

* See a form of such affidavit in Smith's Chanc. Prac. p. 961, 6th edition ; and see a form of the order in Seton on Decrees, pp. 1040, 1041.

Very nice questions often arise as to whether a defendant is compellable to produce particular documents: some of the principal grounds of objection are, that they do not tend to support the plaintiff's case, but rather relate to that of the defendant: or that they are privileged on the ground of professional confidence between the defendant and his solicitor or counsel.

Occasionally a party is entitled to have part of a document produced, but is not entitled to see the rest: in such a case, the privileged part is sealed up, and the grounds of privilege are explained in the affidavit.

An order for production of documents by the plaintiff is obtainable by any defendant, after he has put in a sufficient answer to the interrogatories, if any have been served on him.* Formerly a cross bill was necessary for this purpose; and if a defendant wishes for production of documents by a co-defendant before decree, he must still file a cross bill,† but *after* decree a defendant may take out a summons at chambers for production of documents by a co-defendant.‡

If the defendant put in an insufficient answer to an interrogatory as to documents, exceptions to this answer will lie; but ordinarily a plaintiff should not in such a case except, but should proceed in chambers, where he can have the same discovery on this point as would be given by a sufficient answer: if exceptions be filed, the proceeding will, in the absence of special circumstances, be considered vexatious, and will be

* See 15 & 16 Vict. c. 86, sec. 20.

† Attorney-General v. Clapham, 10 Ha. App. 68.

‡ Hart v. Montefiore, 10 W. R. 97; 15 & 16 Vict. c. 86, sec. 20.

punished in the awarding the costs. If the defendant make an insufficient affidavit as to documents, the plaintiff may apply at chambers for an order that the defendant file a further affidavit, and the time for filing named in the first order will be enlarged accordingly. (See Seton on Decrees, 1043.) It seems that this order may, if desired, be applied for in Court. (See 5 Jurist, N. S. 1120.)

The proceedings necessary to obtain an order in chambers in other cases are generally similar to those just described : a summons is obtained and served on all parties interested, in the same manner as a summons to proceed on a decree ; on the return of this summons the parties attend by their solicitors, and support or oppose the application by affidavits. The hearing is usually had before the chief clerk, though any person may insist on an adjournment before the Judge himself : and in a proper case, the matter will be adjourned into Court to be argued by counsel. The order made, if simple, is drawn up by the chief clerk, and afterwards entered in the ordinary way with the registrar : indeed, in all the more common cases printed forms are used, when it is merely necessary to fill up the blanks and impress the seal : if, however, any difficulty occurs as to the form of the order, a mere minute is indorsed by the clerk on the summons, which is taken to the registrar, when the order is drawn up, passed, and entered as usual with orders pronounced in Court.

Before leaving the subject of proceedings in chambers, it may be observed that certain regulations as to such proceedings have been drawn up and agreed upon

between the Master of the Rolls and the three Vice-Chancellors. These regulations prescribe the forms which are generally to be observed, but are not held absolutely obligatory in every case,* not having the force of general orders of the Court. They will be found in 'Morgan's Chancery Practice.'

* *Re Hargreave's Settled Estates*, 7 W. R. 156.

CHAPTER III.

FURTHER CONSIDERATION.

WE have already seen that a suit is very seldom disposed of by a decree made at the hearing, but that something ordinarily remains to be done in pursuance of this decree; and we have also seen, in the last Chapter, in what manner the directions given for this purpose are carried out in chambers by the chief clerk, acting as the deputy of the Judge. Sometimes the object of the suit will be completely attained by what is done in chambers, as, for instance, in the case of a redemption suit by a mortgagor: here the decree directs an account of what is due on the security for principal, interest, and costs, and of what the mortgagee has received, in case he has been in possession, and that on payment of the balance by the mortgagor, the mortgagee shall reconvey to him: if these accounts be taken in chambers, and the deed of reconveyance be there settled, if necessary, and executed by all parties without further compulsion, there is no need to recur to the Court: the mortgagor has got back his estate discharged from the mortgage, which is all that he asked or could get by his bill. In this case, from the nature of the suit, even the costs are disposed of

under the original decree: but in most cases, as we have seen, the decree says nothing about the costs: so that at least this question will usually remain to be disposed of on a further hearing, after the chief clerk has made his certificate.

Under the old practice, when the accounts were taken before the Masters, in pursuance of the directions of the decree, this subsequent hearing, after the Master had made his report, was called a hearing on further directions, or on further directions and costs, as the case might be: it is now called a hearing on further consideration.

When a certificate has been made by the chief clerk, it is, as we have seen, filed in the Report Office, after which office copies can be procured by the parties. It is the duty of the party having the carriage of the business to bring the cause on for further consideration, if necessary, but (except by consent) nothing can be done with that view until eight days have elapsed from the filing of the certificate: after that time the cause will be set down at the request of that party, on his producing to the registrar an office copy of the certificate. During six days the party having the carriage of the order has the exclusive right of thus setting down the cause: but after fourteen days from the filing of the certificate, it may be set down by any party.*

The cause must not appear in the daily paper until ten days have elapsed since it was set down: and notice of the fact that it has been set down must be given to all parties at least six days before the first on

* See 21st Cons. Ord., rule 10.

which it can possibly appear, consistently with the above rule.

Cases frequently arise, in which the parties agree upon the order to be made on the hearing, and then the cause will generally be fit to be taken on a short cause day.

The briefs to be delivered to counsel at the hearing will consist of the old briefs used at the original hearing, together with an abbreviated copy of the decree made thereon, and of the body of the certificate made by the chief clerk : to these will be added the minutes of the order, if any, agreed upon between the parties. If necessary, the schedules to the certificate may be added.

The case will come on in its turn, and be argued, and an order will be made and drawn up in the manner already described with respect to a decree. This order, in its general nature, is similar to a decree ; and, like it, is sometimes final, and sometimes directs a further reference to chambers : on this reference further proceedings are taken, the result of which is embodied in a further certificate, and the cause may, if necessary, be again set down for further consideration : but most commonly the proceedings taken under an order on further consideration finally dispose of the suit, including the question of costs, which, as we have seen, is generally left untouched to the last.

CHAPTER IV.

SUPPLEMENT AND REVIVOR.

WE have shown in a preceding Chapter in what manner, at any time before issue joined, the plaintiff can by amendment introduce into his bill any matters which it is necessary should be put in issue between the parties, but which are not raised on the bill as originally filed : and this, whether the omission of the new matter arose originally from negligence or accident, or from the fact that the plaintiff could not, before he had seen the defendant's pleadings, know that it would be necessary to make any mention of it : and it will be remembered that no provision is made for amending the bill after issue joined, *i. e.* after replication has been filed, or notice of motion for a decree has been given, or the cause has been set down to be heard on bill and answer. Until the legislation of 1852 made an alteration, as hereafter will be mentioned, another restriction existed as to the liberty of amendment, namely, that no matter could be stated on the bill which had not happened before the original bill was filed, from which time all the pleadings were supposed to speak. No means therefore existed of introducing into the original bill any facts, except such as happened before that bill was filed, and

were introduced into it before issue was joined in the suit.

But obviously cases would sometimes occur where this restriction prevented the parties bringing before the Court facts which ought to have the greatest influence on the determination of the suit: and especially if, after the institution of the suit, any of the parties died, any decree would be useless which could be made on pleadings which took no notice of this circumstance. This difficulty was surmounted by the use of bills called bills of revivor, or of supplement and revivor, or of supplement simply, according to the particular purpose to be served by them. It is not our intention to enter on a discussion of the nature and differences of these several species of bills, which will be found to be fully treated of in Lord Redesdale's Treatise: it will be sufficient to say here that, generally speaking, in each of them the whole of the original bill was set forth, together with the new matter, and that the defendants were interrogated and had to put in answers: and when the suit was brought to hearing, a decree was made to the effect that the original suit should proceed as if the new matter had been contained in the original bill. These proceedings were of course very tedious and expensive.

We must now proceed to describe the new practice with respect to supplement and revivor, by which all unnecessary expense and delay are avoided.

In the first place, the distinction no longer exists between facts which occurred before and those which occur after the commencement of the suit, but all may alike be introduced into the original bill, and this

may be done by amendment until issue has been joined in the suit, after which stage amendment is still, generally speaking, impossible.

But it often happens that the new event so requiring to be introduced is one which wholly deprives some party of any interest in the subject of the suit, as the marriage of a female, plaintiff or defendant, or it may be the death of a party to the suit whose interest does not survive to any other party to the suit: in these cases the suit is said to have become *abated* or *defective*, and to require to be *revived*: this is done by what is called an order* of *revivor*, obtainable on motion or petition as of course, in the form given in the Appendix, No. XV. 5: in simple cases, no amendment of the bill is necessary, but the suggestion on which the order is based is a sufficient statement on the record of the facts there mentioned. This order is served on the persons made parties to the suit by it, and they enter appearances as if they had been served with a bill, after which they are considered as parties to the suit. If, however, the circumstances be at all complex, it will be necessary to state the facts expressly on the record, either by amendment or, after issue joined, in the way to be described directly; and the new parties can then be compelled to answer interrogatories founded on this statement.

If a suit become abated after a decree has been made, and the plaintiff neglect to revive it, any of the defendants can do so: but a defendant cannot revive

* See 15 & 16 Vict. c. 86, sec. 52. *Inchley v. Allsop*, 7 Jur. N.S. 1181.

a suit before decree;* he may, however, if the abatement arise from the death of a sole plaintiff (before or after decree) obtain an order that the representatives of the plaintiff may revive the suit within a limited time, or that the Bill be dismissed.† A similar order may be obtained where the abatement has arisen from the death of one of several plaintiffs,‡ or from the marriage of a female plaintiff. Provision is made by the Jurisdiction Act, for the discharge of an order of revivor, in case it be obtained against improper persons, when the person obtaining it will usually have to pay the costs.§

In case it be necessary for the plaintiff, after issue joined, to state on the record any new matter happening after the institution of the suit: this is done by filing what is called a Supplemental Statement, which will embody the matter in the same form as the stating part of a bill: upon this the defendants can be interrogated, and may put in their answers in the ordinary manner; the time within which the proceedings are taken, and other details of the practice being generally similar to those in the case of a bill, but subject to the discretion of the Court.||

* 'Smith's Chancery Practice,' sixth edition, p. 734.

† 32nd Cons. Ord., rule 4.

‡ *Chichester v. Hunter*, 3 Bea. 491, *Saner v. Deaven*, 6 Bea. 30.

• *Daniell's Chancery Practice*, third edition, p. 648.

§ 15 & 16 Vict. c. 86, sec. 52. 32nd Cons. Ord., rule 1.

|| 15 & 16 Vict. c. 86, sec. 53. 32nd Cons. Ord., rule 2.

CHAPTER V.

MOTIONS.

WE have several times alluded to orders of the Court made in suits, not upon occasion of the hearing, but at other times, either before or after the decree, and we have seen that in certain simple cases these orders can be obtained at chambers. These are generally of little importance, and never involve the principal question in the suit: but it not unfrequently happens that the relief given by the Court would be absolutely useless, if the plaintiff did not get it before the hearing; where in fact it is required immediately; and even where this is not the case, most important questions not unfrequently arise in such a form, that they cannot be well determined on the hearing, or on further consideration. There are two modes by which such questions can be brought before the Court: by motion, when no lengthened statement is required in addition to the pleadings to indicate the point to be decided: and by petition, when it is necessary to have a written statement of the grounds of the application. Of petitions we shall treat in the following Chapter.

The first Section of the present Chapter will describe the general nature of and proceedings upon motions, and the Second will enumerate those which are of greatest importance and most frequent occurrence;

in the Third we shall say something of a peculiar kind of motion called a Motion of Course, whereby, in proper cases, orders may be obtained not only without any discussion, but even without any notice to any other party, all that is necessary being that the proceedings should be regular.

SECTION 1.

Special Motions in General.

We have said above that a motion is the mode adopted for obtaining an interlocutory order of the Court, when no written statement is needed of the grounds of the application, but the pleadings in the cause are sufficient. This rule however is by no means a competent guide in determining practically whether in any particular case the proceeding by motion will be proper, or whether recourse must be had to a petition : in fact, no general rule exists on this point, and the practitioner must trust to his experience alone. Mention will be made in this and the following Chapter of some of the more frequent and important applications made by motion and petition respectively.

In the third section of this Chapter we shall point out the cases in which what are called motions of course are applicable : the motions now under consideration, called for the sake of distinction, Special Motions, always require to be mentioned to a Judge of the Court, and to be supported by evidence ; in both which particulars they will be found to differ from Motions of Course.

Motions may be made by any party to a suit, and

at any period of its progress ; indeed there are some instances of motions being made even before a bill is filed, where the matter was very urgent, and the preparation of the bill would have occasioned a long delay. Moreover, a person not a party to a suit may move in that suit, if he have any reason for doing so : for instance, if he be interested in the subject-matter, and yet his interest is not such as to make him a necessary party, or no one has chosen to take the objection that the suit is defective on account of his absence.

When it is determined to bring a motion before the Court, the first question to be considered relates to the notice to be given of this intention. When a matter is pressing, or the object of the application would be defeated by its being prematurely disclosed to the parties affected, no notice need be given : and when the application is founded on the fact that the party cannot be found, and no appearance has been entered for him, so that he has not given any address for service, then an advertisement in the ' Gazette ' is substituted for the service of notice of the motion.

In general, it is not necessary to give notice to all the parties in the suit, but it is sufficient that all should be served whose interests are affected by the particular application : the party making the application must exercise his discretion in the selection of parties to serve, at the peril of having his motion refused with costs, in case the Court judge any person to be interested who has not been served. If persons are served unnecessarily, their course is to do nothing, and incur no expense ; for they have no interest in the decision of the question, and therefore ought not to increase the

expense of the application by appearing upon it; and the moving party can receive no injury from their non-appearance, for on his producing an affidavit of service, he will be entitled to whatever order seems just, even if the Court judge the party to be interested. If a party served incur expenses in ascertaining whether or not his interest requires that he should appear, and it turns out that his appearance is not necessary, he may nevertheless appear merely for the purpose of securing the repayment of these expenses;* provided, of course, no better method of obtaining this object was open to him. The form of a notice of motion for an injunction will be found in the Appendix, No. XXI. It will be seen that this document informs the person on whom it is served of the time of the application, and also of the name of the counsel by whom it will be made: this latter, however, is not essential: the Judge before whom it is made must be the one to whose Court the cause is attached, except sometimes when a pressing occasion arises for making an application in a pending suit during the vacation: in such a case, it may be made before any Judge who may happen to have remained in London.

The exact object of the application should also be stated, for the Court cannot make any order except in conformity with that asked, or differing from it only in being less to the advantage of the person moving. If it be intended to ask for the costs of the motion, it is usual, though not strictly necessary,† to mention it in the notice.

* *Heneage v. Aikin*, Jac. and Walk., 377.

† *Clark v. Jaques*, 11 Bea. 623; *Butler v. Gardener*, 12 Bea. 525.

In general there must be two clear days between the service of the notice, and the day on which the motion is to be made, but in a proper case the Court often gives leave to serve notice for an earlier day.

At the foot of the notice will be observed a list of the affidavits to be used at the hearing : the applicant cannot use at the hearing any affidavits, which could have been but were not included in this list : but no notice need be given of the intention to use affidavits filed after the notice was given, which the other party must therefore search for and procure copies of from the Affidavit Office : whenever it is reasonable, the Court will adjourn the hearing, in order to give each party time to answer any affidavits filed on the other side so late, that there was not time to answer them before the hearing.

The evidence to be used at the hearing consists generally of the pleadings and affidavits filed by the different parties : as to the use which may be made of the pleadings by the plaintiff and the defendants respectively, the same rules apply as those already detailed in our Section on the Evidence of the Pleadings. Formerly a rule prevailed that, not only might a defendant read his answer on applications as to receivers and injunctions, but this answer was, so far as it went, conclusive in his favour, so that no affidavits could be read in opposition to the statements contained in it : this however is altered by the Jurisdiction Act of 1852,* and now the answer of the defendant is regarded only as an affidavit, and affidavits may be read in opposition thereto.

* 15 & 16 Vict. c. 86, sec. 59.

All the observations made in a former section with respect to affidavits to be used on the hearing, of course apply equally to those to be used on a motion, or other interlocutory application.

The briefs to be delivered to the counsel will consist of the pleadings in the cause, the notice of motion, and the affidavits on both sides.

The order in which motions are heard differs materially from that already described with respect to the hearing of causes and other proceedings: these, it will be seen, are entered by the registrar in lists, and are called on in the order in which they stand in these lists: but no mention is made to the registrar, or other officer of the Court, of the intention to bring on a motion. In the *Sittings Paper*, which is published at the beginning of each series of sittings of the Court, certain days are mentioned as *seal or motion days*: on these, the daily list of business mentions merely that motions will be heard, without specifying in what causes: the business is opened by the Judge asking the senior counsel present whether he has anything to move, and if so he proceeds to make his motion, which is thereupon heard. When this is finished, the senior counsel, if he be within the bar, is again and again called on, until he has made two opposed, and any number of unopposed motions, after which the next counsel in seniority has a similar opportunity of making one, or if he be within the bar two or more motions: when all the barristers present have been thus called on, and each has had the opportunity of making one, or, if a *Queen's counsel*, two or more motions, the senior is again called on, and so on until

no more motions remain to be made by barristers : the Judge then asks whether any other person has anything to move, which seldom happens, and if there are no more motions, the Court goes on to other business. The days set apart for motions are generally one in each week, besides the first and the last day of the sittings. If any motions remain unheard on the rising of the Court, they may be resumed the next day. Motions may, under special circumstances, be heard on any day, whether during the sittings of the Court or not, and particular favour is in this respect shown to motions for injunctions.

Two counsel are generally heard for each party who appears on a motion, but the number will be regulated by the length of the papers, and the difficulty of the question : the counsel for the party on whose behalf the motion is made are first heard, then those for the other parties, called the respondents, and lastly the senior counsel for the moving party replies : the Court thereupon pronounces its judgment, of which minutes are taken, and an order is drawn up as before explained with respect to decrees. If the order says nothing about the costs, these are regulated according to certain general rules, the effect of which is that unsuccessful parties bear their own costs, and all others, whether successful or simply passive, are entitled to their costs as "costs in the cause," the meaning of which phrase will be explained in the last Chapter of this Part.

SECTION 2.

Principal Kinds of Motions.

We have said that no general rule can be laid down as to the cases in which applications can be properly made to the Court by motion, and that there is no safe guide on the subject but experience, or lists compiled by practitioners of experience. No attempt is made in this Section to do more than to mention a few of the very commonest and most important species of motions. And first of injunctions.

1. An injunction is described to be a writ issuing out of Chancery in the nature of a prohibition, that is to say, a writ which has the same operation as a prohibition issued out of the Courts of Common Law. By these writs the party enjoined or prohibited is commanded not to do, or to cease from doing, some act, so that in general they are applicable only where it is sought to preserve matters *in statu quo*: although occasionally what are called mandatory injunctions are issued, by which a person is commanded to cease to allow things to remain *in statu quo*, although he can obey this command only by being active in bringing about an alteration. It will be observed that even in mandatory injunctions the form of prohibition is retained; and there is no difference between the two classes with regard to the practice of obtaining and enforcing them. In fact, the reason why injunctions which are in effect mandatory are framed in a prohibitory form is, that equity is said to have no jurisdiction to compel on motion the performance of a substantial act, such as the pulling

down a wall, though the same effect is produced by the Court ordering that the defendant be restrained from permitting the wall to remain.*

An injunction is obtainable against any person who threatens and intends to do an inequitable act, which would cause irreparable damage to another: among the acts which are most frequently restrained by injunction are, the bringing or continuing an action at law, the committing waste, whether "legal" or "equitable," the negotiating promissory notes or other such instruments, and the selling stock, ships, or other property: but, in fact, the occasions when this writ is a proper remedy are as varied as the objects of the jurisdiction of the Court of Chancery, and no enumeration could be made which would not be imperfect. We are here concerned with nothing but the practice relating to injunctions, which is quite independent of the object with which the writ is sought.

It is a general rule that no injunction will be granted unless it be prayed for by a bill already on the file: but after a decree has been made in any proceeding for the administration of the estate of a deceased person, the executor or administrator is entitled to the protection of an injunction to restrain any creditor from suing him at law although no injunction has been in terms prayed for, because when the Court has undertaken to administer the estate, the creditor should have come into chambers, and proved his debt under the decree. In consequence of this rule, it is a common practice to pray for an injunction by the bill in cases where there is not really

* See *Drewry on Injunctions*, 260.

any present intention of moving for it, by which course the expense and delay of amending the bill at a future time is avoided, if it happen in the course of the suit to become necessary to obtain the writ: in order to afford ground for the prayer, it is necessary to allege that the defendant threatens and intends to do the act to be enjoined, which is therefore often alleged, when the defendant has in fact never threatened, and has given the plaintiff no reason to suppose that he intends to do it.

When circumstances have rendered it necessary to obtain the injunction, this is done by motion, in the manner pointed out in the last Section, motions of this kind differing in little or nothing from other motions: as before observed, they may be made at any time that the Judge can be found, and not only during the sitting of the Court on motion days, this privilege being given them because it often happens that the necessity is extremely urgent which has driven the plaintiff to apply for this protective writ; a case recently occurred in which this aid of the Court was obtained in little more than two hours after the need of it arose. In such a case, there being no time to give notice to the defendant of the intended application for injunction, the usual practice is to grant an "interim order" for an injunction, and to put the plaintiff upon terms, under which he may be compelled to compensate the defendant, if the Court should at the hearing think that the interim order ought not to have been granted. A breach of an interim order is as much a contempt of Court as a breach of an injunction.

If the relief sought be granted by the Court unconditionally, the order is simply that an injunction be awarded, restraining the defendant from doing the act mentioned in the notice of motion; this order is not itself the injunction, but it is the authority to the proper officer to seal the writ, as we shall see directly. It often happens that the Court thinks that the plaintiff's complaint may be well founded, but yet sees that it may turn out otherwise, and that in that case the defendant will have suffered wrongful damage by being restrained from the exercise of his right, by the hasty order of the Court founded on the imperfect acquaintance with the facts of the case, which can be gathered from the affidavits: and yet the defendant could not recover compensation at law for this wrongful damage, nor is there jurisdiction in Equity to compel a plaintiff to make compensation to a defendant: in such a case the Court will refuse the injunction, except upon the terms of the plaintiff undertaking to abide by such order as the Court may think fit to make at the hearing, as to damages or otherwise, which submission gives a jurisdiction, where without it there would be none. Often also the application stands over to a future time, as until further affidavits have been filed, or until some trial or other proceeding has been had at law, and in these cases the defendant generally is obliged to undertake not to do the act mentioned in the notice, which undertaking differs in nothing but form from an injunction. It should be remembered that in the frequently occurring case of a Court of Equity refusing to grant an injunction till the plaintiff has established

his legal right, the Courts of Equity are now bound to decide any questions of law which require decision before equitable relief can be granted.*

As soon as the order has been made that an injunction be awarded, notice should be served on all parties restrained by it, that the order has been made, and that all proper steps will, without loss of time, be taken to perfect it, and to issue the writ in regular form: if any person do the act in question after the receipt of this notice, or after the order has in any manner come to his knowledge, he will be liable to the same proceedings as if he had disobeyed the writ itself, for the Court will not allow a man to do an act before the writ is sealed, which, if the writ were sealed, would be a contempt of Court.

The order for the writ is drawn up, passed, and entered in the manner previously described with respect to a decree. The solicitor for the plaintiff then obtains an office copy of the order, and prepares two copies of the writ itself, one on parchment to be sealed, and the other on paper to be filed: he takes these three documents to the Clerk of Records and Writs, who seals the writ, and files the paper copy, docquet, and order. The writ is then served on each person restrained by it in the usual manner, by showing the original, and leaving a copy. The form of the writ itself will be found in the Appendix, No. XXII.

Unless some limitation be made by the terms of the writ itself, an injunction continues in operation for ever; and if any person disobey the command, the plaintiff may obtain an order on motion that

* See 25 & 26 Vict. c. 42.

such person be committed to the Queen's Prison for contempt of the order of the Court. Notice of such motion must be personally served on the party to be affected by it. If the person restrained think that the restraint ought not to be continued, he must move to dissolve the injunction, and should not disobey it simply, even though he be advised that for some defect of form the writ is a nullity. If, on the hearing of an injunction suit, the plaintiff sustain his right to the writ, the decree orders that the injunction be made perpetual, after which it cannot be dissolved by motion, but only by some proceeding in the nature of an appeal, which will be treated of hereafter. Motions to dissolve injunctions do not call for any particular remark.

2. *Receivership.* — It often happens that neither party in a suit is entitled to possession of the property concerning which the dispute has arisen, but that pending the suit, the Court ought itself to be in possession: in such cases it is sometimes ordered that the property be brought under the control of the Court, which can be done if it consist of money, stock, or other investments of money, or of plate, jewels, or other such articles: these are in the one case paid into the Bank of England to the credit of the Accountant-General; in the other, are deposited with the Record and Writ Clerk: it is common also to order deeds and books of account to be so deposited, and to deliver them out, or allow them to be inspected, as occasion may require. But if the property be land, or outstanding personal estate, this mode of taking possession by the Court is inap-

plicable, and it is in such a case that a Receiver is appointed, who is an indifferent person appointed to be *pro hac vice* an officer of the Court for the purpose of holding possession : and as such officer he has scarcely any discretion, but must at every step apply for the direction of the Court.

We say nothing here as to the cases in which a Receiver will be appointed, which is a question belonging rather to Equity Jurisprudence than to our present subject. The appointment must generally be prayed by the bill, which asks that a fit and proper person may be appointed to receive and get in the property in question : the application is usually made before decree by motion, although it may be made at chambers when the parties consent, or when the object is merely to supply the place of a Receiver, who is dead, or has otherwise become incompetent. The order made on the motion usually directs that a proper person be appointed : in which case the chief clerk inquires at chambers as to the fitness of any person proposed to him, and if satisfied as to this, and as to the sufficiency of the proposed sureties, the security is executed and enrolled, and thereupon a certificate is made, stating what has been done : the form of the certificate is given in the 'Treatise on Chancery Practice' of Mr. Daniell, p. 999, 3rd edit. If any party to the suit wish to propose himself as Receiver, he must obtain the special leave of the Court.

Sometimes, however, the Court is satisfied at the hearing of the motion that a specified person would be a proper Receiver, and in that case he is at once appointed by the order, without the necessity of a

reference to chambers. If any person, usually one of the parties to the suit, be willing to perform the duties of Receiver without remuneration, the Court will often appoint him ; and in this case he will not in general be required to give any security. Otherwise the Receiver is paid either a fixed salary, or a percentage on all moneys passing through his hands : and he is required to give security for the regularity of his accounts and payments in the shape of a recognizance by himself and two sureties, given to the Master of the Rolls and the senior Vice-Chancellor, conditioned to be void on his being duly discharged from the office, after having accounted for his receipts at the times named in the order of appointment. Receivers' accounts are periodically brought into chambers, with vouchers, and an affidavit of correctness, and are passed in the same manner as accounts directed by a decree. When circumstances no longer require the employment of a Receiver, he is discharged by order. For the orders of the Court as to Receivers, see 24th Cons. Ord., and 35th Cons. Ord., rule 23 ; see also 15 & 16 Vict. c. 86, s. 59.

3. *Ne Exeat*.—A *ne exeat* is a writ addressed to the sheriff of the county in which any defendant in Chancery is resident, commanding him to take bail from the defendant not to quit England without leave of the Court. This writ is granted only on a bill containing a suggestion that the defendant intends to leave England for the purpose of avoiding the equitable demand of the plaintiff, and must in general be prayed for expressly. It is granted on motion, which will usually be *ex parte* and supported by affidavits

showing that a sum of money is actually due from the defendant to the plaintiff, or will be due on taking accounts between them, and that the defendant intends to abscond. The plaintiff's demand must be one enforceable in Equity, though the Court will not refuse the writ merely because the plaintiff might also have a remedy at law for the money. The affidavits must be clear and positive, as the Courts act cautiously in issuing so potent a writ, and in one case Lord Eldon observed that "the Court ought to feel no inclination to extend the application of the high prerogative writ of *ne exeat regno*," and that "if men will not take from their debtors security enabling them to proceed at law, they must abide by the consequences."* The writ is drawn up and sealed in the same manner as a writ for an injunction: when sealed, it is delivered to the Under-Sheriff, by whom it is executed. It may be discharged on motion, either on the ground of irregularity, or upon merits.

4. *Dismissal of Bill*.—A Bill of Complaint may be dismissed out of the Court at the application either of the plaintiff or of the defendant.

With respect to dismissal at the instance of the plaintiff, we need only observe that it cannot be obtained in general, except upon the plaintiff paying to all parties the costs they have incurred: for the plaintiff is presumed to confess that his litigation was unfounded, since otherwise he would not thus bring it to an end, before he had obtained the object of it. Circumstances, however, sometimes arise in which the plaintiff will be allowed to dismiss his Bill without

* *Whitehouse v. Partridge*, 3 Swan, 379.

costs.* An order for dismissal on payment of costs may be obtained by the plaintiff by motion of course.

But the more important species of motions to dismiss are those made by defendants with the view of expediting the progress of the suit. We have seen that in each proceeding it is generally the duty of the plaintiff to take the initiative, in advancing the suit a stage; and although, on the plaintiff's neglect, the defendant may often take the required step in his stead, yet it will often happen that the defendant does not wish the step to be taken at all, and wants nothing but to be rid of the suit. In such a case, a motion to dismiss for want of prosecution is the defendant's proper course. This motion may be made whenever the plaintiff has omitted to take any step in the suit for a period longer than that fixed for the purpose by the general order of the Court which specifies the various cases which may arise:† it is supported by the certificate of the Clerk of Records and Writs, showing the dates of the various proceedings which have been taken, and can be answered only by the plaintiff taking the required step, and paying to the defendants the costs of the motion. The Court has of course jurisdiction in its discretion to refuse the motion, on such terms as seem just, although the mere dates show that the defendant is entitled to his order. It is essential that the defendant should be in no default, which rule sometimes renders it necessary for him to take a step for the mere purpose of putting himself into a position to move: as, if after

* See *Goodday v. Sleigh*, 3 W. R., 87.

† 33rd Cons. Ord., rules 10, 11, 12, 18.

interrogatories have been served, and before an answer has been filed, the plaintiff abandons the suit, but refuses to pay the costs of the defendant: here an answer must be filed before the payment of the costs can be compelled, for until he has answered the defendant is in default, and is not in a position to move to dismiss.

The above remarks apply chiefly to motions to dismiss for want of prosecution: but bills are dismissable for other causes, as if the subject-matter of the suit is below the value of ten pounds, when the suit is considered beneath the dignity of the Court.

SECTION 3.

Motions of Course.

We need not be long detained by the subject of Motions of Course. We have seen that some orders can be obtained only on at least an *ex parte* statement of the merits before one of the Judges of the Court, while others are granted after a hearing before one of the chief clerks: in both these cases, a judicial discretion is exercised, as to the advisability of granting what is asked. But there are cases in which a party is entitled of right to a certain order, which therefore he obtains of course, *i.e.* without any judicial action being called into play, but merely on satisfying the officer that the circumstances are such as entitle him to it: in considering this, the officer acts merely ministerially, and if he refuse to allow the application, the proper course for the applicant to adopt is not to appeal to a higher authority, but to move, before a

Judge, that the officer be directed to do the required act.

To obtain an order of course by motion, a brief is delivered to counsel, who gets it marked by the registrar in Court, whereupon the order is drawn up, passed, and entered in the usual way : copies are then served on the solicitors of the opposite parties.

If one party in a suit think that another party has improperly obtained an order on a motion of course, he should move before the Judge to whose Court the cause is attached to discharge the order.

Orders of course are not so frequently obtained on Motion as on Petition, as we shall see in the Second Section of the following Chapter.

CHAPTER VI.

PETITIONS.

WE have seen at the commencement of the last Chapter, that when an application is to be made of such a character that its nature cannot be shown without a narrative, in addition to the pleadings in the cause, there the proper mode of making the application is by petition. In the First Section of the present Chapter will be described the general nature and form of petitions ; and in the Second we shall say a few words on petitions of course.

It is a universal rule that money cannot be paid out of Court on motion : all applications for such payments must therefore be made by petition.

SECTION 1.

Petitions in General.

When an order is sought which is procurable on petition, the first step to be taken is to prepare the written statement or petition itself. In cases of any importance or complexity this is done by counsel.

In the next Part we shall see that petitions are often presented where no suit is pending with respect to the subject-matter, and a specimen of such a petition is given in the Appendix, No. XXV. To this

the reader is referred, as sufficiently exhibiting the general form of petitions in causes, which differ from it only in being entitled in the cause, in the same manner as all other proceedings. Any person, whether a party to the cause or not, may petition in a cause.

After the title comes the address of the petitioner, which, if the petition is to be heard before a Vice-Chancellor, is directed to the Lord Chancellor, or to the Master of the Rolls, if the petition is to be heard before him: the body of the petition contains the statements of the matters on which it is founded, put in the same manner as in a bill; it concludes with a prayer for the specific order sought, or for such other order as the Lord Chancellor or Master of the Rolls (as the case may be) shall think right: all the observations formerly made as to the prayer of a bill apply equally to that of a petition. By the 34th Cons. Ord., r. 1, it is provided that at the foot of every petition (not being a petition of course), shall be placed a statement of the persons, if any, intended to be served therewith; thus a petition will now show on its face (which was not the case previously) who are the *respondents*, or persons who may appear at the hearing of the petition, and either oppose or consent to the granting of the prayer.

The petition, having been prepared, is copied on paper, and left with the secretary of the Lord Chancellor or Master of the Rolls, as the case may be, by whom an indorsement is made on it to the effect that his Lordship, or his Honour, doth order that all parties concerned do attend him thereon on the next day

of petitions : and that notice is to be given forthwith. The signing this indorsement by the secretary constitutes what is called answering the petition, which, when answered, is returned to the petitioner's solicitor.

The next proceeding is to give notice to the proper parties ; these must be chosen by the petitioner at his own risk, as already explained with respect to service of notice of motion : the notice is given by service of a copy of the petition with the indorsement, which service must be made in time to leave two clear days before the hearing. The petitioner should be careful to serve only those who are interested, since any person who is served has a right to appear, and the petitioner will have to pay the costs of such person, unless the Court thinks that his appearance was solely for the sake of getting his costs.* A copy of the petition is left with the secretary of the Judge by whom it is to be heard.

In the paper of business issued before each sittings of the Court, certain days are set apart for petitions : on these days, the daily business paper contains the names of all causes and matters in which petitions are to be heard, which are called on in order, in the same manner as causes ; and if the counsel for the petitioner be in attendance, and there be no opposition, the petition is heard, and the order made in the usual way : if counsel be not in attendance, or there be opposition, the Court passes on to the next. When all the unopposed petitions have been taken, the Court passes to those to which there is opposition, and hears them in the same way. When at last the list has been called

* See 'Smith's Chancery Practice,' sixth edition, 153, 154.

through, and all matters disposed of in which counsel appear, it is again called through, and the name of each petition is struck out, if no one answers.

The costs of petitions are in general regulated by the same rules as those of motions. There is no peculiarity in the orders made on petition, to call for any special notice here.

SECTION 2.

Petitions of Course.

Petitions are, as we have said, used more commonly than motions for obtaining orders of course: the reason is, the greater cheapness and rapidity of the proceedings. Such petitions are generally presented to the Master of the Rolls, though the Judge of each of the branches of the Court may make orders of course in any cause before any of these branches: and when a petition for an order of course is presented to the Master of the Rolls it does not require to be answered nor heard: but by virtue of a General Order made in 1833, the secretary can at once draw up an order on the petition, which is passed by him, and entered by the under-secretary, without any recourse being had to the Registrar's Office. Such petitions require no service on any person.

If an order of course be obtained on petition, and any party wish to set it aside for irregularity, he should apply to the Judge to whose Court the cause is attached.

CHAPTER VII.

ON CONTEMPT.

By the writ indorsed on the copy of the bill served on each defendant, as the first step in every suit, the Queen orders the defendant, within a limited time, to cause an appearance to be entered for him in the proper office of the Court : and after appearance, the defendant is subject to the orders from time to time made in the cause, and also to the General Orders of the Court, made for the conduct of all suits. The acts which he is required to do by these orders are sometimes merely formal acts, such as entering an appearance or executing a deed ; which, if the defendant will not do himself, another person can effectually do for him ; sometimes the payment of money, which, if the defendant neglect it, can be enforced by process similar to that in use at Common Law ; and sometimes acts for the performance of which it is absolutely requisite that the defendant should be personally active, such as the putting in of an answer, where it is clear that no effectual substitute can be found if the defendant absolutely refuse to obey the order : he may be coerced by imprisonment or otherwise, but all the power of the Court is insufficient to make him state what he knows in answer to the interrogatories.

A plaintiff by filing his bill submits to the jurisdiction of the Court, as much as the defendant does by appearing. Whenever a party to a suit has allowed the appointed time to elapse without doing some act which he is required to do by any order, he is said to be in contempt, and cannot in general take any step in the cause until he has "purged his contempt," that is, done the act required, and satisfied the party aggrieved for the costs incurred by reason of the contempt. Besides this general disability, he is liable to have proceedings taken against him, leading to his imprisonment, or to the loss of his goods and the profits of his lands, according to circumstances. The proceedings differ according to the particular stage of the suit in which they occur; and it will be convenient to divide this Chapter, not according to the nature of the contempt as explained above, but into the following divisions: (1) contempt by neglect to appear; (2) by neglect to answer; (3) by neglect to do some other act required.

We shall throughout speak of the party in contempt as the defendant, and of the party prosecuting the contempt as the plaintiff; but it must be remembered that this language is strictly accurate only in the First and Second Sections: in the cases treated of in the Third Section, the plaintiff may well be the party in contempt, or the proceedings may occasionally be taken by one defendant against another.

SECTION 1.

Contempt by Neglect to Appear.

We have seen that the defendant's appearing is a

purely formal act, and on that account it has been proposed to dispense with it altogether: but on the whole, it appeared to the commissioners whose recommendations were the foundation of the legislation of 1852, that no great amount of expense, trouble, and delay was caused by its retention, and that its abolition would not be advisable. Accordingly, if the defendant neglect to obey the order conveyed by the writ indorsed on the bill, he has incurred a contempt of Court, for which a writ of attachment may be issued against him, but it is more usual for the plaintiff to enter an appearance for him.

For this purpose the plaintiff must provide proof by affidavit that the bill, with its indorsement, was duly served on the defendant within the jurisdiction of the Court, which affidavit will of course show the day of service; if the plaintiff take the required step within three weeks* from the date of the service of the bill, nothing is required beyond this affidavit: but on showing it to the Clerk of Records and Writs he will enter the appearance, after which all the usual steps can be taken, as if the defendant had himself appeared.

But if the plaintiff allow the three weeks to elapse without taking the course just pointed out, he must then obtain a special order on a motion *ex parte*, to entitle him to which, he must produce the affidavit of service, and the certificate of the Clerk of Records and Writs that no appearance has been entered: if

* 10th Cons. Ord., rule 4, and see rule 10, which orders "that no attachment for want of appearance shall hereafter be issued, without a special order of the Court."

the order be granted, it is drawn up, passed, and entered in the usual way, and produced to the Record and Writ Clerk, by whom the appearance will then be entered. After any considerable delay, the Court will not grant the order, but will require a copy of the bill to be served anew.

SECTION 2.

Contempt by Neglect to Answer.

If a defendant neglect to put in an answer, after having been served with interrogatories, the plaintiff may have great difficulty in carrying on his suit: as where it is essential to his case that the defendant should make some disclosure on a subject with regard to which the plaintiff is ignorant. In this case the Court cannot assist the plaintiff further than by detaining the defendant in custody until his obstinacy is overcome: if the plaintiff require an answer merely for the purpose of obtaining evidence, and not of information, then he may, as hereafter explained, by obtaining an order to take the bill *pro confesso*, get the same advantage as if the defendant had put in an answer admitting all the allegations of the bill: but this is a tedious and expensive process; in some few cases the plaintiff thinks he can prove his own case without obtaining an answer, and then he can take a proceeding, called filing a traversing note,* which has the same effect as if the defendant had filed an answer traversing all the allegations of the bill: such cases however are rare.

* 18th Cons. Ord., r. 1.

It must be remembered that if a defendant does not put in his answer within the time limited for that purpose, he may obtain an order for further time ; no proceedings in contempt can be begun against the defendant until he has allowed his time to elapse without obtaining such an order for further time.

The great instrument used by the Court of Chancery for punishing contempts is the writ of attachment, which is a letter directed by the Queen to the Sheriff of the county in which the defendant is supposed to be, commanding him to attach or take the defendant, and have him in the Court of Chancery on a day named in the writ : on the back of the writ is indorsed a notification of the particular contempt in respect of which it is issued. The form of the writ will be found in the Appendix, No. XXIII.

When a plaintiff is in a position to issue an attachment for want of an answer, his solicitor prepares the writ, and takes it to the Registrar's Office, together with two *præcipes*, or requests to the officer to seal the writ : in the Registrar's Office one of the *præcipes* is filed and the other marked ; after which the writ and the marked *præcipe*, together with an affidavit of the service of the interrogatories, are taken to the Record and Writ Office, where the *præcipe* is filed and the writ sealed : the writ is then put in the hands of the Under-Sheriff, by whom it is executed. The Sheriff may, if he please, liberate the defendant on his giving bail for his appearance at the appointed time.

The Sheriff must return the writ by the day named in it, or he will himself become liable to process of contempt ; this return consists in giving back the

writ to the plaintiff's solicitor, with an indorsement on the back, signed by or in the name of the Sheriff, and stating what has been the result of his endeavours to obey the order he has received: this return may be that he has attached the defendant, whose body he has ready, which form is used in case the defendant has been taken and liberated on bail; or that he has attached the defendant, whose body remains in gaol, when the defendant has been taken and sent to prison, or detained, if already in prison; or if the Sheriff has been unable to find the defendant, he returns *non est inventus*. These are the most usual returns, but under special circumstances others may be made.

We have said that if the Sheriff neglect to return a writ, he is liable to committal, and he will also be committed if the return be insufficient: if, however, he make some return, the plaintiff cannot question its truth, however false it may be; but his remedy is to sue the Sheriff at law for a false return, or for an escape or otherwise, as the case may require. In a recent case, where the Sheriff returned facts which amounted to an escape, the Master of the Rolls did not direct the party aggrieved to bring an action, but referred it to chambers to ascertain the loss due to the escape, and ordered the Sheriff to pay the amount certified.

If the return show that the defendant has been taken, and is forthcoming, whether he be actually in custody or have been liberated on bail, the next thing is to bring him personally before the Court: when the return shows that the defendant is out of custody on bail, the plaintiff obtains an order, by

motion of course, for the messenger to bring up the defendant to the bar of the Court, which is done accordingly by the proper officer: if, however, the defendant be actually in custody, the motion is for a *habeas corpus*, directed to the keeper of the prison in which he is confined, requiring him to bring up the defendant: this must be done either within thirty days of the original arrest or detainer, or within ten days of the arrest by the messenger: and if this time be allowed to elapse, the defendant will be discharged, without paying the costs of his contempt, and he is allowed eight days before a new attachment can issue against him.

When the defendant is brought to the bar of the Court, which is understood to mean the personal presence of a Judge, he is questioned as to the reason of his refusing to answer; and in case he allege and prove such poverty as disables him from obtaining professional assistance, a solicitor and counsel are assigned him, as hereafter explained with reference to paupers: if, however, he do not show any valid reason for his neglect he is committed to the Queen's Prison, to the officer of which he is delivered by the person by whom he is brought up.

Such is the procedure by which a defendant, having been taken by the Sheriff, is committed to permanent custody: the plaintiff may thereupon proceed to have the bill taken *pro confesso** against the defendant, as he may also do if the return be *non est inventus*: there is, however, another course which he may adopt on this latter return. On the production

* 22nd Cons. Ord.

of the attachment with this return, together with an affidavit of due diligence having been used to execute the attachment, the plaintiff is entitled to a writ of sequestration :* but inasmuch as this process is more particularly appropriated to the enforcing obedience to decrees, an account of it will be reserved to the next Section.

The course usually adopted when the defendant has been committed to the Queen's Prison, or has absconded, to avoid putting in an answer, is to obtain an order to take the bill *pro confesso*. With a view to this the defendant may, if in prison, be brought up by the keeper : for which purpose a *habeas corpus* must be issued on an order obtained by motion of course, grounded on the certificate of the keeper that he has the defendant in his custody : or the plaintiff may serve on the defendant, within three weeks of the execution of the attachment, a notice of motion to take the bill *pro confesso*, which motion must not be made till three weeks after the notice : in either case, such an order will be obtained, as will be mentioned hereafter. If the defendant have absconded, or escaped, being taken on the attachment or by the serjeant-at-arms, a notice of motion must be served at the defendant's address for service, if he have appeared ; or if the plaintiff have entered an appearance for him, then it must be advertised in the 'London Gazette' and other newspapers. This notice will be sufficient ground for a motion for an order to take the bill as confessed, which must in this case be supported by the production of the attachment with its return,

* 12th Cons. Ord., rule 6.

and by an affidavit showing that there was reason to believe that the defendant would be found in the county in which the writ was issued, and that due diligence was used in endeavouring to execute the writ.

The effect of the order being made is that, on the hearing of the cause, the Court assumes the truth of all the allegations of the bill, as if their truth had been admitted by the defaulting defendant: that is to say, the bill may be read by the plaintiff as against that particular defendant, but of course the other defendants are unaffected by the default, and the order made in consequence of it, and against them the cause is heard in the usual way. If there be but one defendant, the Court will sometimes appoint a special day for the hearing: but otherwise, the cause must be set down, and come on to be heard in the regular way. At the hearing the Record and Writ Clerk attends with the record of the bill, which is thus part of the plaintiff's evidence.

A decree made on a bill taken *pro confesso* is not absolute in the first instance, unless the defendant appear at the hearing, as he may do, and argue the case on the merits. Otherwise, an office copy of the decree must be served, at the defendant's address for service, if any: or if he have not himself appeared, then upon himself personally, if he can be found: and the plaintiff may apply to have the decree made absolute, after the expiration of three weeks from such service, or if the defendant be out of the jurisdiction, then after such other time as the Court may appoint: but in case the plaintiff have not been able to effect service, then three years must elapse before he can

have the decree made absolute; at any time in the interval the defendant may put in an answer, and have the case heard on the merits.

If it appear to the Court that justice will not be done to the plaintiff by merely taking the bill *pro confesso*, the Court may appoint a Receiver of the real and personal estate of the defendant, or may direct a sequestration of such estate to be issued, and may order payment out of such estate to the plaintiff of such sum of money as the plaintiff shall appear to be entitled to.

Such then is the procedure adopted where the defendant refuses to answer the interrogatories. It is seldom that the plaintiff can dispense with this answer, for otherwise he would not have required it: but if he think that he can himself prove his case, he may save great expense and delay by filing what is called a traversing note.* This may be done as soon as the defendant's time to answer has expired. The note is a pleading put in by the plaintiff on behalf of the defendant, and its effect is simply to deny the statements of the bill, and to put the plaintiff to the proof of the whole. It is engrossed on parchment, and will be filed by the Clerk of Records and Writs, on the production to him of an affidavit of service of the interrogatories. A copy of the note must then be served on the defendant, in manner directed by the 4th and 6th Rules of the 3rd Consolidated Order, for the service of documents not requiring personal service, after which evidence can be gone into, and the suit can proceed in the usual way.

* 18th Cons. Ord., rule 1.

SECTION 3.

Non-Performance of Decrees and Orders.

The decrees and orders of the Court command the defendant either to pay money ; or to do some other positive act, as to execute a conveyance or other deed, to bring in an account, to deliver up possession of land or property, or the like : or to abstain from doing some act, as is usually ordered by injunctions, whether granted by order on an interlocutory application, or by decree at the hearing. The assistance given by the Court against an obstinate and defaulting defendant varies with the nature of the act required to be done by him.

Previously to the year 1839, the process for enforcing obedience to the decrees and orders of the Court of Chancery, was founded on contempt alone, and was carried into effect by attachment or sequestration ; but by the combined operation of sec. 18 of 1 & 2 Vict. c. 110 (which places all persons to whom any money or costs have been ordered to be paid by decree or order in Equity in the position of judgment creditors), and of the orders* made in pursuance of sec. 20 of the same Act, such persons may, after the expiration of one month from the time of passing and entering the decree or order, sue out a writ of *feri facias* or of *elegit* against the goods or lands of the defaulter. These writs are in form similar to those in use at common law ; the Sheriff, on receiving the writ, will levy the sum named therein, in the usual manner. The person in whose favour the

* 29th Cons. Ord., rules 6-10, and Schedules F and G to the Orders.

order is made may have the benefit of the above process, though he be not a party to the suit in which the order was made;* nor is any demand of the money or costs required before issuing process.†

It must be borne in mind that the above writs are in addition to, not in substitution for, the ordinary remedies by attachment and sequestration; and moreover that they are only obtainable in cases where the decree or order directs payment of money; in other cases the doing of the act directed by the decree or order must be enforced by the ordinary remedies. If the person in whose favour a decree or order in Chancery is made for payment of money, wishes to complete his right as a judgment creditor, he must register such decree or order, under sec. 19 of 1 and 2 Vic. c. 110.

If the defendant be required to deliver up possession of lands, and refuse to do so after service of the decree upon him, an order may be obtained on motion for a writ of assistance: by this writ, the Sheriff is commanded to eject the defendant and to put the plaintiff in possession, and it is executed in the same manner as a writ of *habere facias possessionem* is executed in favour of a successful plaintiff in the common law action of ejectment. This writ will also be granted to put into possession a Receiver or Sequestrator.‡

The execution of a deed or conveyance is required by the Court, when it appears that the plaintiff has

* 29th Cons. Ord., rule 2.

† 29th Cons. Ord., rule 1.

‡ 'Seton on Decrees,' 1229.

an equitable claim to property, the legal estate or title to which is in the defendant: that is to say, where in fact the defendant is a trustee for the plaintiff. The appropriate means of passing this legal title is a deed; and until the year 1830, a defendant could, if he chose to lie in prison, or to submit to have his property sequestered, by his obstinacy defeat the plaintiff of his rights, although the act required was merely formal. This defect was remedied in the year just mentioned by a statute passed at the instance of Sir Edward Sugden:* and now the Trustee Act of 1852† furnishes a ready means of proceeding in such cases.

In all these cases, the plaintiff gets substantial assistance from the Court, in the pursuit of his right: a large number of acts, however, still remain which are frequently required by decrees, but towards the performance of which no process of execution is effectual, such for instance as the putting in of accounts, or the delivering up of specific chattels or deeds. Here all that can be done is to confine the defendant's person in gaol, in case he can be found: and to deprive him of all his property within the jurisdiction of the Court. The decree or order must be personally served on the defendant, with the indorsement stating the consequences of disobedience (Appendix, No. XVI.), after which‡ a writ of attachment may be had, as explained

* 1 Will. IV., c. 36. Under this statute the Court was empowered to order one of the Masters to execute the Deed for the defendant.

† 15 & 16 Vict. c. 55, sec. 2, and see *Wellesley v. Wellesley*, 4 De G. M. and G., 537.

‡ 29th Cons. Ord. rule 1.

in the last Section. If the contempt be the breach of an injunction, the course is, as has been before stated, to move, after personal service of notice, that the defendant may stand committed: this order, if granted, is executed by the messenger of the Court, and the defendant is ultimately committed to the Queen's Prison, as on an attachment.

By some one of these processes, the defendant is lodged in the Queen's Prison, and will not be discharged until he has purged his contempt, by doing the act required, and paying the costs which his refusal has occasioned the plaintiff, whereupon an order for his discharge may be obtained on motion or petition of course.

A sequestration is a process by which a person is deprived of the use and enjoyment of all his property within the jurisdiction of the Court. It consists of a writ directed to commissioners, usually four in number, commanding them to enter the lands and seize the goods of the delinquent. An order obtained on motion of course is required before this writ can issue: it is sealed by the Record and Writ Clerk, and delivered to the sequestrators, by whom it is executed.

The sequestrators are officers of the Court, and bound to account for whatever comes to their hands by virtue of their office, while any person resisting them in the execution of their duty becomes guilty of a contempt of Court. The money or other property which they bring into Court is not parted with, at least until the defendant has cleared his contempt: and if justice seem to require it, the Court will retain this money as security to the plaintiff for what may

be coming to him from the defendant on the result of the whole suit.

Beyond imprisonment and sequestration, the Court can do nothing: these constitute the last steps in the process of contempt.

It should be observed that an attachment for non-performance of a decree is not, like an attachment for non-appearance, or for default in answering, a process in which bail can be taken; but the party attached must be imprisoned. Until recently it was the duty of the Masters of the Court to visit the Queen's Prison at stated periods, and examine the prisoners confined there for contempt of Court, but now, by a recent statute,* this duty is transferred from the masters to the solicitor to the suitors' fund, who is to visit the prison four times a year, and make a report to the Lord Chancellor of the cases of the prisoners, whereupon the Lord Chancellor may, if he thinks fit, assign a solicitor to any prisoner, to defend him *in forma pauperis*, and to take such steps on his behalf as may be requisite.

* 23 & 24 Vict. c. 149.

CHAPTER VIII.

SUITS BY AND AGAINST PARTICULAR PERSONS.

IN all that has hitherto been said concerning the conduct of a suit in Equity, it has been assumed that the parties to it were men and women of full age, residing within the jurisdiction of the Court, and not under any legal disability. This, however, is frequently not the case, so that particular proceedings often become necessary, to describe which is the object of the present Chapter.

And first, this seems the fittest place to notice one or two peculiarities affecting Peers who may be parties to a suit in Equity. When process of contempt has to be taken against a Peer, it is confined to a sequestration, as no process affecting his person can be executed without a breach of the privileges of the House of Lords: moreover, a Peer puts in his answer upon protestation of honour, and not upon oath or affirmation. A Peer is, however, sworn to affidavits, and on other occasions when he has to give testimony.

In the case of corporations aggregate, the nature of the case renders it impossible to execute any personal process, and it is by sequestration alone that obedience to any order can be enforced. Service of documents on a corporation is effected by serving them in the ordinary manner on any member, and the answer

of the corporation is put in under the common seal. It is sometimes allowed to make an officer of the corporation a party to the suit, for the mere purpose of getting from him the discovery required. It should be observed that by various statutes passed with reference to Public Companies (such as the Lands Clauses Consolidation Act, the Railway Clauses Consolidation Act, and the Joint Stock Companies Acts), provisions are expressly made as to the mode of effecting service of summonses, writs, and other proceedings upon the company.*

When any person who ordinarily would be a necessary party to a suit is not within the jurisdiction, the plaintiff will be excused from bringing him before the Court; in such cases, the practice is to name the defendant in the bill with a note following his name to the effect that he is out of the jurisdiction; or to introduce into the bill a statement that he is so, which will save the bill from being demurrable for want of parties. The jurisdiction of the Court extends only to England and Wales.

The disabilities of which we must treat in the present Chapter as affecting the proceedings in suits, arise from want of discretion or defect of understanding, owing to infancy or lunacy: or from the want of a free will in a married woman: or from the poverty of the party, which disables him from meeting the expenses necessarily incurred in the prosecution and defence of a suit. We shall therefore in four Sections

* See also 7 Geo. IV. c. 46, providing that Banking Companies carrying on business under the Act, may sue and be sued in the name of one of their public officers.

state the course to be taken in the case of (1) infants, (2) lunatics, (3) married women, and (4) paupers.

SECTION 1.

Infants.

The want of discretion which the law attributes to infants, and their inability to make themselves liable for the costs of a suit, give rise to various peculiarities where any party to a suit is under twenty-one years of age.

1. First, when an infant is plaintiff.—An infant cannot institute a suit alone, but must do so under the protection of an adult, who will be answerable for the conduct and for the costs of the suit. This adult is in theory the nearest relation who has no interest contrary to that of the infant; but practically any person, even a mere stranger, may be named as next friend, and the suit may be carried on without the knowledge of those who have the care of the infant. In such a case, however, the Court will, if desired, direct an inquiry whether the suit is beneficial, and will stay all proceedings in the meantime.*

In order that the defendants may know where to resort in case the plaintiff in an infant's suit be ordered to pay costs to them, it is required that the name and residence of the next friend should appear on the bill, in the same manner as that of the plaintiff himself does in an ordinary case. The address of an infant's bill will therefore run as follows :—" Humbly complaining, sheweth unto his Lordship A. B. (an

* *Towsey v. Groves*, 11 W. R. 252.

infant under the age of twenty-one years) by C. B. of etc. his father and next friend, the above-named plaintiff, as follows." The name of the next friend is always mentioned in the title of the cause, but does not (as such) occur elsewhere in the pleadings or other proceedings.

A written authority signed by the next friend must be produced before a bill can be filed on behalf of an infant, and must be filed with the bill: this is required by the Jurisdiction Act* in consequence of the hardship caused in a case where a person had been named as next friend of an infant, of whose very existence he had no knowledge: the bill being dismissed with costs, the first thing the next friend knew of the suit was the defendant's demand for his costs: these costs he was obliged to pay, it being considered that the defendant ought not to suffer, and that the next friend might have an action against the solicitor, who had so improperly used his name.

If a bill be filed in the name of a married woman by a next friend, or any person is named a relator in an information,† a similar authority is required to be signed by the next friend or relator.

If a next friend wish to retire in the course of a suit, he must generally give security for the costs already incurred, and the Court must be satisfied of the respectability of the person proposed as the new next friend. The Court will remove a next friend if it appear to the Court that his continuance will be detrimental to the infant.‡

* 15 & 16 Vict. c. 86, sec. 11.

† See Part I., chap. 1.

Sandford v. Sandford, 11 W. R. 336.

When an infant plaintiff comes of age in the course of a suit, he may abandon it and have the bill dismissed with costs to be paid by the next friend; or he may adopt and continue it, in which case he becomes liable for the costs *ab initio*.

It sometimes happens that two or more suits are instituted on behalf of the same infant with respect to the same matter: in such cases, an inquiry is made as to which of the suits is most for the benefit of the infant, and such one is alone allowed to proceed. We shall see in the next Part that the sanction of the Court can be obtained without bill to arrangements as to the guardianship and maintenance of infants.

2. Infant defendants.—When a bill is filed against an infant, he is served with it in the ordinary way: but substituted service will often be allowed on the parent or other person having the charge of the infant. No step can be taken by or on behalf of the infant in the defence to the suit, until some person has been appointed to be guardian *ad litem*, *i. e.* for the purposes of the defence. It is the duty ordinarily of the friends of the infant to procure the appointment of such a guardian, which is done by the attendance of a solicitor at the Judge's chambers, with the guardian and the infant, and a certificate of the fitness of the person proposed: if all appear satisfactory, the appointment is approved by the Judge, and marked by the registrar, whereon an order is drawn up in the usual way. If, however, the infant be of very tender years, or be resident beyond twenty miles from London, a guardian may be assigned by com-

mission procured on an order of course, the infant's personal appearance being dispensed with : it is usually required, to show that the proposed guardian has the actual control of the infant's person, and is not a mere volunteer.

If the friends of the infant take no steps towards appointing a guardian, the plaintiff may apply that one of the solicitors of the Court may be appointed to appear and answer on behalf of the defendant.*

When a guardian has been appointed, he appears on behalf of the infant, and takes all the other usual steps. The answer put in on behalf of an infant is usually in a fixed form, stating the infancy, and submitting the rights and interests of the infant to the Court : and even if the answer do contain admissions of parts of the plaintiff's case, these cannot be read against the infant, nor do they in any degree relieve the plaintiff from the necessity of strictly proving the whole of his case. The infant's answer may, if it be thought advisable, state any new matter, which may be to his advantage to bring before the Court. Of course this answer cannot be excepted to ; in fact, no discovery can be required from an infant : the answer is put in on the oath of the guardian. If the infant, though not a party to the suit, have been served with notice of the decree, a guardian *ad litem* must be appointed to represent him in the subsequent proceedings. Such appointment will be made in the same manner as the appointment of a guardian to appear and answer.†

* 7th Cons. Ord., rule 3.

† 7th Cons. Ord., rule 6.

An infant defendant is not bound by a decree in the first instance (unless made by consent), but the decree is made *nisi*, and the infant may, on coming of age, put in a new answer, and make a defence, but if he do not, within six months after coming of age, show sufficient cause against the decree, it will be made *absolute*.*

SECTION 2.

Lunatics.

When circumstances make it necessary for a lunatic or idiot to institute a suit in Chancery, his committee should obtain the sanction of the Lord Chancellor, or other person to whom the care of lunatics is entrusted by the Crown, and then a bill is filed in the name of the idiot or lunatic by his committee, who is liable for the conduct and costs of the suit in the same manner as the next friend of an infant: and if the plaintiff, without being idiot or lunatic, is nevertheless imbecile, and not of discretion to commence proceedings, it has been held that he may file his bill by a next friend.† If, after a bill has been filed, the plaintiff falls, through age or otherwise, into a state of imbecility, this is no ground for taking the bill off the file. There is a practical distinction between persons who have been found lunatics by inquisition, and persons who have not been so found: in the former case all applications must be made to the Lord Chancellor, or the Lords Justices; in the latter case the Vice-Chancellors and Master of the Rolls will

* See 'Seton on Decrees,' 685.

† *Light v. Light*, 25 Bea. 250.

sometimes entertain applications : thus if it be necessary to appoint a guardian to defend a suit on behalf of an imbecile person not found a lunatic by inquisition,* or if it be necessary to deal with any fund which is standing to the credit of such a person in a cause,† the proper Court to apply to is that of the Judge before whom the suit is pending.

A lunatic who has been found such by inquisition, when made defendant to a suit, should appear and defend by his committee, who, if he have no interest adverse to the lunatic, will be as a matter of course appointed guardian *ad litem* : and if there be no committee, the defendant not having been found a lunatic by inquisition, the defendant's friends may obtain an order for a guardian to be appointed, as they may also do if the committee have an adverse interest to the lunatic ; in such case the committee must be made a co-defendant. If the defendant's friends take no steps, the plaintiff may obtain the order.‡

The suit is conducted in the usual manner, except so far as the lunatic's incapacity to do any personal act makes a difference. Thus, no discovery can be had from him, nor any process of contempt executed against his person or property.

SECTION 3.

Married Women.

Married women are in some respects looked upon

* *Piddock v. Boulbee*, 1 W. R. 94.

† *Davies v. Davies*, 2 De G. M. and G. 51. *Re Irby*, 17 Bea. 384. *Re Berry*, 13 Bea. 455. See also *Re Burke*, 8 W. R. 534.

‡ 7th Cons. Ord., rule 3. *Bonfield v. Grant*, 11 W. R. 275.

as under the same incapacities as infants and lunatics, with respect to the conduct of suits in which they are interested: for a married woman is as incapable of binding herself for the payment of costs as an infant, and any joint act of hers and her husband's is considered as the act of the latter only, on account of the influence which he is supposed to have over his wife. From these principles has arisen the general rule that the husband must be joined with the wife as a party, whether as plaintiff or defendant: if however the husband be banished from, or have abjured, the realm, or if the wife have obtained an order for protection of her property under the Divorce and Matrimonial Causes Act,* or if a decree for judicial separation have been made under the same Act, she may sue and be sued alone.

In those cases where the wife appears as plaintiff, and has an interest conflicting with that of her husband, as when she seeks to establish her exclusive right to her separate property, or to her equity to a settlement, there she must file her bill by her next friend, making her husband a defendant. No next friend can be appointed without her consent.

The office, duties, and liabilities of the next friend of a married woman are the same as in the case of an infant.

When the husband and wife are joined as defendants, they usually appear by the same solicitor, and put in but one answer: if, however, the wife wish it, she may obtain an order to answer separately, and set

* 20 & 21 Vict. c. 85, ss. 21 and 26; and see 21 & 22 Vict. c. 108, s. 7.

up a defence distinct from that adopted by her husband, in which case she will be liable to the ordinary process of contempt if she neglects to answer. If the husband, having been made defendant to a suit respecting the wife's separate property, be out of the jurisdiction of the Court, the plaintiff may compel the wife to answer.*

If the husband and wife be co-defendants, and the wife, having obtained no order to answer separately, neglect to appear or to answer in due time, process of contempt will issue against the husband; and to relieve himself, he must make it appear to the Court that he cannot prevail on his wife to do the act required: on this, an order will be made that the wife appear, or answer, separately, and thereupon she will be liable to all the ordinary process of contempt.

If a married woman present a petition to the Court, she must do so through the medium of a next friend, even though the petition have reference to her separate property. If, however, she has obtained an order for protection under the Divorce and Matrimonial Causes Act, she may, it seems, petition without a next friend.†

SECTION 4.

Paupers.

The ordinary course of proceeding in a suit involves the payment of money at every step: nothing can be done by a party without incurring expense, both in compensating his solicitor, without whose aid it is

* *Dubois v. Hole*, 2 Vernon, 618.

† *Re Rainsdon*, 5 Jur. N. S. 55.

practically impossible to conduct a suit, and in payment of certain fees required by the rules of the Court, as we shall see more particularly in the Tenth Chapter. Care is taken that these expenses should, as far as possible, be ultimately borne by the party through whose fault the litigation has become necessary ; but years often elapse before this payment can be enforced by the successful suitor, and in the meantime he has been obliged to advance a large sum, which he possibly may be ill able to spare. Poverty thus becomes a most serious obstacle to success in a Chancery suit, and in fact often compels a person having a most righteous claim to forego it altogether, or to submit to some inequitable compromise. That this should be so to some extent is unavoidable from the nature of the case ; and a great amount of vexatious litigation is undoubtedly prevented by the expenses necessary to carry it on ; so that perhaps, on the whole, the interests of society are better promoted by the present system, than they would be by one which, while under it fewer cases occurred of hardship and injustice, yet exposed every one to the risk of having to defend himself against unfounded claims brought by persons who, having nothing to lose in case of defeat, hoped to succeed in extorting something from their victim, by way of compromise.

However this may be, the rules of the Court make some provision for cases where the parties are poor,* and these we will now proceed to consider.

A person who wishes to obtain the assistance of the Court without the usual expense, must present a peti-

* 7th Cons. Ord., rules 8-11.

tion to the Master of the Rolls, setting forth the nature of his case, and praying to be admitted to sue *in formâ pauperis*, and that a solicitor and counsel may be assigned him : to this petition is annexed a certificate of counsel, that the party has just cause to be relieved, and an affidavit by the party himself that he is not worth five pounds in the world, except his wearing apparel and the matters in question in the cause. On this petition, the Master of the Rolls grants his fiat, and an order is drawn up in the usual way, according to the prayer of the petition. So also if a person wish to defend a suit *in formâ pauperis*, he may, immediately on the bill being filed, and without entering an appearance, present a petition at the Rolls for an order so to defend, supported by a similar affidavit.

The consequence of this order is, that no fees are payable to any counsel or solicitor for any business done in the suit on behalf of the pauper, nor does he pay the Court fees usually required on each proceeding : if, however, in the course of the suit he become of such ability that he ought not to continue to sue or defend *in formâ pauperis*, an order may be made "dispaupering" him.

In our Chapter on Contempt we have seen in what manner a defendant is allowed an opportunity of alleging poverty as a reason for not putting in an answer, and that on his proving the allegation, a solicitor and counsel will be assigned to him.

CHAPTER IX.

ON APPEAL.

IN this Chapter we propose to consider the course adopted by a party who considers himself aggrieved by any decree or order of the Court, and the means provided for enabling him to have it set right. It is chiefly with reference to this subject that it is important to consider whether or not the decree or order in question has been signed and enrolled; for the tribunals which are competent to correct it when unenrolled have no jurisdiction over the enrolment, so that recourse must be had to another tribunal.

The proceeding in use to correct an unenrolled order or decree is more properly termed a rehearing than an appeal: it consists in having the matter reheard, either in full or on some one point, and either by the Judge whose decision is in question, or by the Judges of the Court of Appeal: after enrolment; the party must either bring a fresh bill, which is called a bill of review, or he must appeal to the House of Lords.

An appeal to the Lords is commenced by a petition, setting forth shortly the proceedings in the suit, including the decree and the fact of its enrolment, and praying their Lordships to reverse the decree: to this is annexed a certificate signed by two of the counsel

in the cause, that the petitioner has reasonable ground of appeal: on this petition an order is made for the setting down the appeal, and that the respondents answer. This order is served on all the other parties to the suit, even though they have no interest in the point in question. Hereupon the parties prepare their cases, or detailed accounts of the proceedings and of the point to be raised on the appeal, with their reasons for hoping that the decree will be reversed or affirmed, as the case may be. To these cases are annexed appendices, containing copies of the pleadings, decree, and all documents on which anything turns in the appeal: the appellants and respondents frequently join in preparing one appendix only. Copies of these cases and appendices are delivered for the use of their Lordships.

The appeal comes on for argument in its turn, usually in the session next after that in which the petition was presented; it is argued by two counsel for each party, and the Lord Chancellor moves that the decree be affirmed, varied, or reversed as he thinks ought to be done: on this motion the other Law Lords deliver their opinions, and vote: the order made by the House is transmitted to the Court of Chancery, and there acted on.

The other mode of varying an enrolled decree is by Bill of Review,* which is a bill stating the proceedings in the former suit, and pointing out the mistake alleged in the decree; and praying that it may be corrected: if this mistake be error of law, the regular mode of defence to the Bill of Review is by demurrer,

* 31st Cons. Ord., rules 9-14.

on which of course the only question is whether the statements on the Bill show any reason for granting the prayer, which question is identical with the question whether the decree were erroneous: of course, on the demurrer, the defendant does not admit the allegation that the decree was erroneous, which is no statement of fact, but merely of law, which, as we have already seen, it is open to a defendant to dispute on the hearing of a demurrer.

If the bill of review allege error of fact, the defendant appears and answers, and the other proceedings are taken which we have described in the case of an ordinary suit. The right to obtain the reversal of a decree by a bill of review is restrained by the rule that it must be grounded on the discovery of new matter of fact, which could not have been given in evidence at the original hearing, or else on error of law apparent on the face of the decree. In the former case the leave of the Court is necessary before the bill can be filed; in the latter no such leave is required, but it is a case which can hardly arise under the present practice, as decrees now contain no recitals of the pleadings or other proceedings, and therefore it is scarcely possible that any error of law should appear on the face of the decree.

The nature of a rehearing before the Judge to whose decree an objection is taken will be easily understood after the perusal of the following observations on rehearings before the Court of Appeal, concerning which we must enter a little into detail.

The Judges of the Court of Appeal are the Lord Chancellor and the two Lords Justices, who may sit

all together ; or may form two Courts, the Chancellor sitting alone in one, and the two Lords Justices in the other : this latter is the course adopted, unless an application be made that some particular appeal be heard before the full Court : the Court has power (as mentioned in a former Chapter) in a fit case to call in the assistance of a Common Law Judge.*

Any person, whether party to the cause or not, who is aggrieved by any order or decree of the Master of the Rolls or of any of the Vice-Chancellors, may bring it before the Court of Appeal : the only exceptions to this rule are in the case of orders made in the exercise of a discretion vested in an inferior Judge, for it is not allowed to appeal from the discretion of one Judge to that of another : moreover, it is said that an appeal will not be allowed on a question of costs only ; but a doubt has been recently cast on the existence of any such rule, and at all events several exceptions to the rule are recognized : thus, if an appeal be brought on two points, one of which affects the costs only, and the decree be adjudged right on the other point, it may nevertheless be varied on the point of costs :† and also it is allowed to appeal from so much of a decree as directs payment of costs out of a fund in Court,‡ or where the costs form part of the relief prayed by the bill. If a decree or order is made by consent, no appeal is allowed from it.

When an appeal is brought against an order made on motion, the course was formerly simply to make

* 14 & 15 Vict. c. 83, s. 8.

† *Lewis v. Smith*, 1 Mac. & Gor., 417.

‡ *Jenour v. Jenour*, 10 Ves. 562. *Taylor v. Topham*, 15 Ves. 78.

a motion before the Court of Appeal: but now, whether the decree or order appealed from has been made* on motion or in a regular suit, a petition of appeal is presented to the Lord Chancellor, setting forth the decree or order complained of, and that the appellant is aggrieved by it: if any subsequent proceedings have been had under the decree they should be stated, but it is not usual to state any reasons of appeal. To this petition is appended a certificate signed by two counsel, that they conceive that the cause is proper to be reheard. On the faith of this certificate the prayer of the petition is usually granted, as a matter of course; the petition is left with the Secretary to the Lord Chancellor, who procures his Lordship's fiat to it, directing that on payment of the deposit, which is to some extent a guarantee against vexatious appeals, the appeal be set down. An undertaking to pay the costs adjudged is then appended to the petition, and signed by the petitioner or his solicitor, after which the petition is taken to the senior registrar, and twenty pounds deposit paid to him;† he then files the petition and draws up the order to set down the appeal, which is passed and entered, and served on all the respondents, *i. e.* all parties whose interest is in any way affected by the appeal. It may be mentioned that where only one counsel has been engaged in the Court below, the petition of appeal may be set down on a certificate signed by him alone.‡

* 31st Cons. Ord., rule 8.

† 31st Cons. Ord., rule 4.

‡ See *Re Midland Counties Benefit Society*, 12 W. R. 993; see also *Buckeridge v. Whalley*, 10 W. R. 513, and *Parkinson v. Hanbury*, 13 W. R. 191 (*note*).

Special leave is required for the setting down an appeal after more than five years from the date of the decree or order complained of.* The setting down an appeal is not generally allowed to interfere with the progress of the suit,† but in a proper case all proceedings under the decree will be stayed pending the appeal.

The appeal comes on to be heard in regular course: the appellant is usually entitled to begin, unless the appeal be brought from the whole of the decree or orders, when the plaintiff begins, and the hearing is in all respects similar to that in the Court below. The same evidence may be used as was or might have been used at the previous hearing, on which account it is proper to enter in the decree all the evidence, whether it were actually read or not: indeed evidence may be adduced in the Court of Appeal, which was not brought forward before; but the party doing so would be exposed to be condemned in costs, even though he succeeded in his appeal.

The order on the appeal contains such direction as may be thought right as to the deposit: proceedings under the order are taken in the Court below, exactly as if the inferior Judge had made the order in the terms in which it is made by the Court of Appeal.

Orders of the Court of Appeal are subject to revision by bill of review or appeal to the Lords, in the same manner as those of the Master of the Rolls and Vice-Chancellors.

It may not be out of place to observe here, that the

* 31st Cons. Ord., rule 1.

† 31st Cons. Ord., rule 2.

Master of the Rolls and the Vice-Chancellors have respectively power to discharge, reverse, or alter any order made on motion or petition *of course* by any other of them, or by the Lord Chancellor.*

* 13 & 14 Vict. c. 35, s. 29.

CHAPTER X.

COSTS.

WE have from time to time, and particularly in the Section where we treated of Paupers, stated that every step in a Chancery suit involves expense, not only in paying the solicitors engaged for their time and labour, but also in paying certain fees to the Court : indeed, it is well known that these expenses were formerly so large as to amount to a denial of justice in all cases where the property in question was not of a very considerable amount ; and though this is no longer the case, yet still questions relating to the costs are often very important. In the present Chapter we propose, first, to explain generally the nature of costs ; secondly, to state some of the principal rules which determine by whom costs are to be borne in particular cases ; and lastly, to explain the mode in which the amount to be paid is ascertained, and the payment of it enforced.

SECTION 1,

Of the Nature of Costs.

We have said that the costs of a Chancery suit consist of the solicitor's expenses and the Court fees.

The business done by the solicitors of the parties consists partly in procuring copies to be made of papers necessary for the purposes of the suit, partly in attending at the offices of the Court and elsewhere, and in drawing briefs, affidavits, the simpler kinds of petitions, and other documents which are not of a nature proper to be prepared by counsel: for all this business the solicitor is entitled to charge, according to a rate fixed by the orders of the Court, which is supposed not only to compensate him for his actual time and trouble necessary for the performance of the particular act, but also for the expense to which he was put in attaining that knowledge of his profession which he now employs for the benefit of his client. In almost all cases the amount of remuneration to which the solicitor is entitled is determined by the number of folios, of seventy-two words each, contained in the proceedings: in the case of copies the labour is evidently in exact proportion to the number of words, and therefore no objection can be raised to this mode of assessing the payment to be made, provided of course the copy were necessary; but the labour of drawing an affidavit or petition shortly is often greater than that of preparing it more at length, and yet the longer it is, the greater is the payment allowed: this appears to be holding out a direct premium to the neglect of brevity, but perhaps any other system of fixing the amount of a solicitor's remuneration would leave more to the discretion of the officers of the Court than would be desirable; unless indeed the present system were altogether abolished, and the remuneration of a solicitor were left

free to be fixed by the same influences as govern that of other professions.

Besides items coming under some of the classes of expense just described, the solicitor charges for fees paid to counsel for their assistance, whether in the way of drawing pleadings, petitions, and other documents, or for advice on cases submitted to them, or for appearing and arguing in Court: the solicitor also pays the solicitors of other parties for any copies of documents which he may require, and which by the rules of the Court are procurable from the adverse solicitor: and lastly, the payment of the Court fees* requires the expenditure of a considerable amount of ready money.

These fees are payable on almost every occasion when anything is done in the offices of the Court, in the progress of a suit: the amount is fixed by the General Orders, and it is the duty of the officer to see that the proper sum is paid. The payment is made by means of adhesive stamps affixed to some document dealt with on the occasion, which stamps are defaced or cancelled in the office to prevent use being made of them a second time: the stamps are issued by the Commissioners of Inland Revenue in the same manner as other stamps, but a separate account is kept of the number sold, and the amount paid for them is carried to the credit of a fund called the Suitor's Fee Fund: this fund is the primary source from which are paid the salaries of some of the officers and other expenses connected with the Court. When any question arises affecting the amount pay-

* 39th Cons. Ord.

able to this fund, notice is served on a solicitor who acts for the fund, and instructs counsel to appear and advocate its claims.

Having thus seen what is the nature of the items which make up a solicitor's bill of costs, we shall proceed to consider who is to pay it.

SECTION 2.

By whom Costs are paid.

It very frequently happens that in the course of a suit some fund is paid into Court, there to await the final decision on the rights of the parties to it. When this is the case, the costs are often made payable out of this fund, and not directly by any party, although of course the expense falls on the persons, whether parties or not, to whom the residue of the fund belongs, after payment of the charges on it: this is called giving costs out of the fund.

When an interlocutory application is disposed of, directions are sometimes given, forming part of the order, as to the defraying the costs of the parties to the application: and, as we have said, certain general rules exist for determining the question, when the order is silent on the subject. The result is, that sometimes a party has to bear his own costs, in which case the solicitor has no one to look to but his client: or one party may have to pay costs to another, which payment can at once be enforced in the manner described in the next section: or lastly, the costs of some party may be "costs in the cause," which means

that no determination is at present come to on the subject, but these costs will be payable in the same manner and by the same parties as the general costs arising from the regular proceedings in the suit. The interlocutory proceeding is, as it were, incorporated with the main body of the suit, when the costs of it are made costs in the cause.

The successful party in an action at law, whether plaintiff or defendant, is in general entitled to judgment for his costs, and to recover them from his adversary, without any order being made on the subject : questions may, and often do, arise as to the amount payable, especially with reference to the County Court Acts ; but this does not affect the general principle that success entitles the party as of right to his costs.

In Chancery it is otherwise : no party has any right to his costs of suit, and the giving them is a matter for the discretion of the Judge in each case : no costs of suit can ever be recovered, unless this discretion be exercised, and an order be made directing payment. With the view of expediting the proceedings in the suit the rule is generally observed, that no direction for the payment of costs will be given, until the matter comes before the Court at such a stage that probably it will not come on again : thus no direction as to costs is usually given in a decree directing accounts and inquiries in chambers, for the hearing on further consideration is considered the proper time for deciding the point, especially as the discretion of the Judge in dealing with the costs will often be regulated by the result of these accounts and inquiries.

We shall now proceed to indicate, very briefly, a few of the principal rules governing the discretion of the Judge in allowing and refusing costs of suit. And in the first place we observe, that in suits for administration of estates, the costs of all proper parties are in general paid out of the fund, before any part of the fund is applied in payment of the creditors or legatees,* and this whether the plaintiff be a creditor, legatee, or executor: if, however, the fund be insufficient to pay all the costs, the executor, whether he be plaintiff or defendant, is entitled to his costs in the first instance; but if it be clearly made out that the executor has been guilty of fraud or negligence, whereby the suit has become necessary, he will have to pay not only his own costs, but the costs of the other parties.† So in all proceedings wherein persons are brought before the Court, or seek its aid, in a fiduciary character, the payment of their costs will be provided for, unless they have so wrongfully acted in the trust as to induce the Court to make them pay their own costs.‡ Again, it is another well-settled rule§ that in suits for ascertaining the construction of a will, the costs of all proper parties will be paid out of the general estate of the testator, on the principle that, the suit having been caused by his ambiguity of expression, his estate must pay the penalty.

In foreclosure suits the plaintiff usually is entitled

* *Ford v. Earl of Chesterfield*, 21 Bea., 426.

† *Tickner v. Smith*, 3 Sm. & Giff., 42.

‡ See 'Lewin on Trusts,' 4th edit., 663 *et seq.* . *Noble v. Maymott*, 14 Bea., 480.

§ *Jolliffe v. East*, 3 Bro. C. C. 25.

to the payment of his costs of suit out of the mortgaged estate, in addition to the payment of the principal and interest of his debt, and it may be stated as a general rule that the costs of suits (whether for foreclosure or redemption) brought for the purpose of enforcing the rights of parties to transactions in the nature of mortgages are directed to be added to the mortgage debts of the parties, the effect of which is that they are borne by the person whose property is the subject of the charge ; but if the property be insufficient, the parties will have to bear their own costs ; except in the case where a foreclosure suit is brought by the mortgagee against the original mortgagor, in which case it seems that an order will be made for their payment by the defendant personally.*

When a suit is brought merely for the benefit of the plaintiff, without any default on the part of the defendant, as in the case of a bill of discovery, the costs must be borne by the plaintiff : also, if a bill be brought by a devisee to establish the will against the heir, the whole costs must be borne by the plaintiff, even though the defendant insist on his right to an issue, and fail on the trial : if, however, the heir vexatiously question the sanity of his ancestor, he will not be allowed his costs.

However, in the great majority of cases, the Court will in general be guided by the result, and give costs to the party who, on the whole, is successful. It must nevertheless be observed, that if the plaintiff by his bill ask more than he shows himself entitled to, he will be considered as the unsuccessful party, even

* 'Smith's Chancery Practice,' 6th edit., 818.

though he do obtain a part of the relief asked : thus, if the bill contain a charge of fraud against the defendant, which is not proved, or if it ask that the defendant may be ordered to pay the plaintiff's costs, where the plaintiff does not show any title to such an order, these circumstances will operate to the disadvantage of the party who has made these unfounded claims. The Court will also, in disposing of the question of costs, consider the conduct of the parties in the suit ; if, for instance, an irrelevant issue be raised, or a great quantity of evidence be adduced on an unimportant issue, the expense of these useless proceedings will often be thrown on the party in fault.

As in the case just mentioned, it is not uncommon for the costs of different parts of the suit to be borne by different parties.

SECTION 3.

Costs, how taxed and paid.

When costs are to be paid by one competent party to another, the order directs payment to be made to the solicitor of the latter of the amount of the costs, "such costs to be taxed by the proper Taxing Master, in case the parties differ about the same : " and in cases of incompetency, the taxation is not optional : we thus see that taxation of the costs is a step which must be taken before the amount can be recovered. We must, therefore, now describe the meaning and mode of taxation.*

The solicitor of the party claiming payment of

* See the 40th Cons. Ord.

costs under the order, whom we shall term the plaintiff, makes out a fair copy of his bill, with a space left for any deductions which may be made in the amounts charged : this copy he takes, together with the order, to the office of the Taxing Masters, in order to obtain an appointment for proceeding with the business. The bill is indorsed with a memorandum of the name of the proper Taxing Master : for this purpose, the names of the Masters are taken in rotation, unless any bill has been already taxed in the same suit, in which case the reference is made to the same Master as before. When the name of the proper Taxing Master is ascertained, the bill and order are left with his clerk, who mentions what is the earliest time at which the Master will be disengaged : notice to attend at this time is served on all parties interested.

At the appointed time, the solicitors of all parties attend before the Master, who goes through the bill : he requires evidence that the business charged for has actually been done, that it was reasonably necessary that it should be done, as part of the business mentioned in the order, and that the amount charged is reasonable. The papers in the cause are usually the evidence that the business has been done, and one document will often be a voucher for several items in the bill ; for instance, the production of an order will prove that certain steps must have been taken before that order could have been obtained, and will therefore act as a voucher for the charges for those steps.

Most of the questions that arise on taxation relate to the necessity of the business charged for with reference to the terms of the order : for although the

business may have been absolutely necessary, yet it may be such as will not be allowed on taxation, unless particularly mentioned in the order. For instance, if the order direct the taxation of the costs of a party, this will not in general include any expenses incurred before the institution of the suit: if therefore an opinion of counsel were taken as to the propriety of commencing proceedings, and the plaintiff thinks himself entitled to the expenses of this opinion, he must take care that the order directs taxation not only of his costs, but also of his costs, charges, and expenses properly incurred with reference to the matters in question in the suit. As to what steps will be considered reasonably necessary for any desired end, a considerable body of rules exists; but still a great deal is left to the discretion of the Taxing Master.

The amount which it is allowed to charge for each step is in general fixed by the General Orders of the Court; cases however arise in which the Master has to exercise his discretion on the subject. Sometimes the order directs that the costs of some party, as of the plaintiff in a creditor's suit, be taxed as between "solicitor and client:" in this case the taxation is conducted on the principle of allowing to the solicitor all payments for proceedings, which, though not strictly necessary for the purposes of the suit, were yet undertaken at the request or with the sanction of his client: in other cases the taxation is directed to be made between "party and party," which is on a less liberal scale.

When the Master thinks that any deduction, total

or partial, ought to be made from the amount of any item, he enters the deduction in the column appropriated for the purpose: the amount of the bill and of the deductions is then ascertained, and the difference will be the costs allowed, after the addition or subtraction of the costs of the taxation; these will be borne by the party indicated by certain rules which have been laid down on the subject, and of which the result is that the party in fault, if any, bears the whole expense. The Master makes a certificate of the result of the taxation, which is filed in the Report Office, and copies of it may be procured as in the case of a chief clerk's certificate.

If any party be dissatisfied with the result, he may bring any particular point a second time before the Master, who will review his decision: if necessary, the point may then be brought before the Court by summons at chambers,* on the hearing of which no other evidence can in general be used than what was used before the Master.

If the costs are payable out of a fund in Court, a cheque for the amount will be made out on the production of the order and the Taxing Master's certificate at the office of the Accountant-General: if payable from one party to another, the payment may be enforced by writs of *fieri facias* and *elegit*; or steps may be taken to make the non-payment a contempt of Court.

For this purpose a writ is sued out, called a subpoena† for costs: the form given in the Appendix,

* See Order of 2nd August, 1864.

† 40th Cons. Ord., rule 38.

No. XXIV., shows that this is an order from the Queen to the defendant to pay the amount; on neglect to obey this order, an attachment and other process of contempt issues as already described. The subpoena itself is a sufficient authority to the bearer to receive the costs mentioned in it, and no power of attorney is necessary for the purpose.

It remains to say a few words on the giving security for costs. The Bill, as we have seen, contains the address of the plaintiff: if this address show that the plaintiff resides out of the jurisdiction of the Court, and that not in any official capacity,* nor on actual service in the army or navy, or if the address given be vague and uncertain, or wilfully false, the defendant is entitled to require some guarantee that if the plaintiff fail in his suit, and be ordered to pay the defendant's costs, he (the defendant) will be able to obtain them. For this purpose he should apply for an order that the plaintiff give "security for costs," and that in the meantime the proceedings be stayed. This order is granted on motion or petition of course, if founded merely on what appears on the bill; otherwise it is obtained by motion made to the Court in the regular way, notice being given to the party interested, and the application being supported by affidavit. By taking any step in the suit after becoming aware that he is entitled to this order, the defendant waives his right to it. If the order be made and served, the plaintiff either gives to the Record and Writ Clerk† a bond of two or more persons, in the

* *Evelyn v. Chippendale*, 9 Sim., 498.

† 1st Cons. Ord., rule 38. 40th Cons. Ord., rule 6.

sum of £100 conditioned for the payment of the costs which may be adjudged payable by the plaintiff; or he pays into Court a sum of money sufficient to produce £100, when the expense of getting it out is provided for. Until one or the other course has been adopted, the time allowed to the defendant for taking his next step in the cause does not run.

If there are several plaintiffs, and any one of them is within the jurisdiction, the defendant cannot have an order for security for costs, though all the other plaintiffs are abroad.

PART III.

PROCEEDINGS WITHOUT BILL.

WE have hitherto been employed in tracing the course of proceeding in suits commenced by bill: this is the general mode of bringing any complaint before the Court, and may be adopted in every case; and whenever another course is adopted, the party adopting it must be prepared to show an authority for so doing. This authority is to be sought either in the original inherent jurisdiction of the Court, which in some few cases allows a proceeding to be commenced without bill; or in some one of the numerous statutes, under which it is sufficient to commence by petition or motion. If any party file a bill in a case where it might have been dispensed with, he must bear the extra costs occasioned by the adoption of this more expensive course, unless he can show any particular circumstances which take his case out of the general rule. Before proceeding further we may remark, that for a careful summary of the numerous and important matters disposed of by the Court of Chancery (without bill filed) under the jurisdiction conferred on it

by particular statutes (commonly called its "statutory jurisdiction"), the reader cannot do better than consult a work published in 1861, and entitled 'Barry's Statutory Jurisdiction of the Court of Chancery,' which in addition to the various decided cases bearing on the subject, contains an Appendix of Precedents likely to prove of great service to the practitioner.

We said at the beginning of the Second Part that the obtaining a decree is in many cases but an unimportant and almost formal step in a suit, and that the real contest arises during the proceedings after a decree. • It is to meet such cases that the policy of many of the statutes just referred to is framed: they give no new jurisdiction to the Court, or do not enable it to make any decree or order which might not have been made under the inherent jurisdiction in a suit commenced by bill between proper parties: they merely provide a speedy and inexpensive mode of arriving at a decree or obtaining an order without the necessity of long written pleadings. Others of those statutes, and especially the Trustee Acts, do confer new jurisdiction, as well as point out a short and easy mode of exercising it. There are others of those statutes which cannot well be referred to either of these heads: but the division is of no practical importance.

The most convenient mode of classifying the various subjects of this summary jurisdiction appears to be by reference to the classes of suits which would originally have been necessary to obtain the object sought. But first we must notice a mode of commencing proceedings by Special Case, which is applicable in particular cases, whatever be the nature of the point

calling for decision. Next we shall notice a recent statute under which Trustees can obtain the advice and direction of the Court as to the management of the property entrusted to them without resorting to the expense of a suit; we shall then mention several statutes which give the Court a summary jurisdiction over questions which arise as to the rights and interests of persons, whether incapacitated or otherwise, claiming under Settlements. Several recent Acts have dispensed with the necessity of a bill in proceedings often instituted by or against Trustees; these will be noticed in the Third Chapter: the Fourth will treat of the summary mode of obtaining a decree for administering the estate of a deceased person; while the Fifth will discuss the miscellaneous subjects connected with the jurisdiction of the Court over Solicitors, Charities, Winding-up Joint Stock Companies, and the Registration of Titles, which subjects do not seem to belong to any of the preceding classes.

If the reader be in the habit of attending the Court of Chancery, he will have observed that matters are frequently heard before the Judges which form no part of the proceedings in any suit, nor are authorized by any of the statutes noticed in this Part: such are Petitions in Lunacy, for which one day in each week is usually set apart by the Lords Justices; also Petitions of Appeal in Bankruptcy, which are heard by the Lords Justices, or, as has lately been the practice, by the Lord Chancellor; such too are the applications relating to patents, inquisitions, writs of *scire facias*, *habeas corpus*, and the like, which are

usually made by motion before the Lord Chancellor. None of these matters belong to the equitable jurisdiction of the Court, with which alone we are concerned in this work : it will be sufficient here to state that the care of lunatics has been, and in fact usually is, committed by the Queen's sign manual to the persons who fill the offices of Lord Chancellor and Lords Justices :* that practically all applications in Lunacy are made to these latter Judges ; that the jurisdiction as a Court of Appeal which the Bankrupt Law Consolidation Act, 1849, conferred on one of the Vice-Chancellors, was transferred to the Lords Justices by the statute† which instituted their office : while the other matters which we have mentioned come before the Lord Chancellor, as Keeper of the Great Seal, and form part of the business transacted in the Petty Bag Office.‡

We may mention in this place, the proceeding by Petition of Right, which, it will be remembered, is the mode in which a subject makes a claim against the Crown, which claim would, against a private person, be the subject of an action or suit. This procedure is now regulated by "the Petitions of Right Act, 1860,"§ which, after reciting in its preamble that it is expedient "to assimilate the proceedings, as nearly as may be, to the course of practice and procedure now in force in actions and suits between subject and subject," proceeds to lay down the mode in which such Petitions are to be framed, and submitted to the

* See 14 & 15 Vict. c. 83 ; 15 & 16 Vict. c. 87, s. 15.

† 14 & 15 Vict. c. 83, s. 7.

‡ 12 & 13 Vict. c. 109.

§ 23 & 24 Vict. c. 34.

Crown, answered or pleaded to on behalf of the Crown, and heard before the Courts of Equity or Common Law. If the Petitioner or "Supplicant" succeeds, he may recover costs against the Crown. The Attorney-General usually represents the Crown in such cases. Some general orders have been made as to the procedure under this Act, dated the 1st of February, 1862.*

* See commencement of vol. 10 of the 'Weekly Reporter.'

CHAPTER I.

SPECIAL CASES.

THERE were until recently two modes by which in particular cases decisions could be procured on questions of almost every nature, namely by Claim and Special Case. The former was merely a modified form of bill, not admitting of any further pleading: the order made on a claim being of the same nature as that made on a bill. It is not however now necessary to make any further allusion to Claims, as they have been recently abolished,* on the ground that, although useful at the time when they were introduced (1850), they have, since the improvements introduced by the Jurisdiction Act of 1852, become unnecessary, and were but little used. A Special Case is applicable only where the parties are agreed as to the facts of their case, but desire the decision of the Court on the law applicable to those facts: it can be brought only by consent of all parties, and the decision made upon it is in the nature of a declaratory decree only, without any possibility of giving the consequential directions which usually follow a declaration of right in an ordinary decree.

Special Cases were introduced by an Act of Parlia-

* 8th Cons. Ord., rule 4.

ment* passed in 1850, at the instance of the present Lord Justice Turner. The special case is entitled between different parties as plaintiffs and defendants, and states the facts in successive paragraphs in the same manner as a bill: it concludes with stating, in the form of questions, the points on which the opinion of the Court is asked. The signatures of counsel for the different parties are appended, and the whole is engrossed on parchment, filed, set down, and heard in the ordinary way: on the hearing, the Court will answer each of the questions proposed, unless in its discretion it declines to answer one or more of them. The parties to the case will be precluded from disputing the correctness of these answers (except of course by way of appeal), or the truth of the statements of fact on which they are founded; but the answers will not bind nor in any manner affect persons who are not parties to the case. It is better to make all the persons interested parties to the case: since the Court will sometimes, in the exercise of its discretion, decline to give any answer to a question put by some only of the persons interested.

One of the questions should always relate to the costs of the case, unless the parties can agree among themselves how they shall be borne: otherwise, each will have to pay his own.

Various provisions are made by the Act for enabling infants and lunatics to concur, through the medium of guardians or committees: but this concurrence does not bind the infant or lunatic to the truth of the facts, but only to the correctness of the law as laid

* 13 & 14 Vict. c. 35.

down on these facts : hence the answers given on a special case to which incompetent persons are parties do not absolutely preclude all future litigation on the subject. The husband of a married woman may concur on her behalf if she claim no interest distinct from him ; if otherwise, both must concur.

In the year 1850, both claims and special cases were a great improvement on the then existing practice of the Court. At that time, bills were far longer than at present, and no decree could be had in any suit until all the defendants had answered, and generally it was necessary to take a great quantity of written evidence : when the suit did come to a hearing, no decree could be made, unless all the parties interested were before the Court, and even then it often happened that no declaration of right could be made until after long and expensive proceedings in the Master's office, for the purpose of taking accounts which no one wished to be taken, and of ascertaining facts which no one doubted. It was therefore a great boon to suitors, when they were enabled by claim to get a cheap and speedy decree, without bringing any useless parties before the Court ; and by special case, to get what was equivalent to a declaratory decree, without any useless accounts and inquiries. These advantages far outbalanced the inconveniences that if, in the course of a proceeding by claim, it became necessary to have some discovery from or an injunction against the defendant, the expense incurred in the claim was thrown away, and a bill had to be filed : and that on a special case, any slight error in the facts often deprived the parties of that security which

they sought, and if in the same matter any person wanted an account to be taken in Chancery a bill had to be filed for the purpose.

But at present these inconveniences remain, while the conveniences have vanished : a decree can be had on a bill to which no interrogatories are filed, almost as speedily and cheaply as on a claim : and when a bill is once filed, it can be adapted by amendment to any new circumstances which may arise. Moreover a suit by bill properly constituted effectually indemnifies all persons against the claims of infant or lunatic parties ; and the Jurisdiction Act of 1852 allows the Court in its discretion to make a merely declaratory* decree, and to proceed in the absence† of persons interested ; by this, all the advantages of a special case are attainable, without the disadvantage above referred to.

For these reasons claims are abolished, and special cases are less frequently filed at present than formerly : and therefore we have not thought it worth while to enter at length into the details of practice concerning them.

* 15 & 16 Vict. c. 86, sec. 50.

† 15 & 16 Vict. c. 86, sec. 42.

CHAPTER II.

PETITIONS FOR OPINION OF THE COURT.

UNTIL the year 1859 there existed no means by which trustees could obtain the protection of the Court in the management of the trust property (i cases where there was no suit actually pending with reference to the property) except by filing a bill.

In that year, however, an Act was passed which is calculated to be of great service to trustees, and to save considerable expense to trust estates. The Act* enables any trustee, executor, or administrator, without instituting a suit, to apply to any Chancery Judge, either by petition in open Court, or by summons at chambers founded on a written statement of facts, for the opinion, advice, or direction of the Judge on any question respecting the management or administration of the trust property, or the assets of any testator or intestate; and the Act provides that such trustee, executor, or administrator, acting upon such opinion, advice, or direction, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator, in the subject-matter of such application; but the applicant will gain no indemnity under the Act, if he have wilfully concealed or misrepresented any fact.

* 22 & 23 Vict. c. 35, sec. 30.

By a further Act* it is provided, that every such statement or petition shall be signed by counsel, and that the Judge may require the aid of counsel, either in chambers or in Court.

The general result of the decisions hitherto made upon these Acts is, that the Court will act on the assumption of the truth and correctness of the allegations in the petition or statement, and will therefore admit no affidavits in support of such allegations;† that the Court will not give its opinion on questions of construction, or upon a nice question of law, and will recommend a bill to be filed: that it will deal similarly with a case where the question is one of detail, requiring the assistance of affidavits;‡ that no inquiry in chambers can be directed;§ and that the petitioners must serve the petition on such persons as they think fit, and state at the foot of the petition whom they have so served.||

Some General Orders with reference to these Acts were issued on the 20th of March, 1860. They will be found in Morgan's 'Chancery Orders,' page 682, 3rd edition.**

* 23 & 24 Vict. c. 38, sec. 9.

† *Re Muggeridge's Trusts*, Johnson, 626.

‡ *Re Barrington's Settlement*, 1 Johns & H., 142.

§ *Re Mockett's Trusts*, Johns., 628.

|| *Re Green's Trusts*, 8 W. R., 403.

** In the last edition of this work it was stated that the Court would decide questions of construction under this Act; but in a very recent case, Wood, V.C., said that the Court might have at first decided such questions *per incuriam*, but the practice was now settled the other way. (*Re Bunnett*, 10 Jur. n.s., 1098.)

CHAPTER II.*

SETTLEMENTS.

THE Court of Chancery exercises a summary jurisdiction in a great variety of cases relating to settled property. Such of these cases as relate to trustees will be the subject of a future Chapter: in the present, we shall consider some other cases, first premising that we use the term "settled property" with reference to property settled by will as well as to property which is the subject of a technical settlement. First, we shall describe the nature of the summary jurisdiction exercised in the case of infants and other incompetent persons; secondly, that which promotes the preservation of settled property; and thirdly, that which relates to its management: these divisions perhaps run the one into the other, but on the whole they seem the most convenient.

SECTION 1.

Infants and Incompetent Persons.

In this Section we shall consider some cases in which the Court gives authority to acts done (as is presumed) for the benefit of incompetent persons.

1. Infants. The Court of Chancery is the guardian

of all infants who have no other guardian, and it is the duty of those under whose care any infant possessed of property is left after the death of his father or guardian, to make him a ward of Court. This is done by filing a bill praying for the protection of the Court, concerning which mode of proceeding we need say nothing in this place: or by the summary process of a summons in chambers.

This Jurisdiction of the Court over infants has long been exercised in a summary way, without bill filed: formerly, the course adopted was by presenting a petition entitled in the matter of the infant, praying for the appointment of a guardian, and the approval of an allowance, out of the infant's property, for his maintenance. Under the present practice the course is still more simple: a summons entitled in the matter of the infant is taken out at chambers,* and served in the same manner as if it were in pursuance of a reference to chambers, contained in a decree directing the approval of a guardian and maintenance: on the return of this summons, and on the production to the Judge in chambers of satisfactory evidence† as to the infant's age, property, and relations, an order is made to the effect required. The order thus made is as effectual for all purposes as if made in a suit regularly instituted: if however circumstances make it desirable, directions will be given for the filing of a bill. But however the proceeding be commenced, the Court will from time to time make such orders as

* See 15 & 16 Vict. c. 80, sec. 26; and 35th Cons. Ord., rule 1.

† See rule 19 of the "Regulations as to business in Chambers," which will be found in 'Morgan's Chancery Orders.'

may be necessary for the management of the property of the infant, and for his proper maintenance and education: every such order being made on a summons in chambers, whence the matter may be adjourned into Court, in case any point arises of importance sufficient to require counsel. We may here mention that by the "Infants' Custody Act" (2 & 3 Vict. cap. 54) the Court has power, on the petition of the mother of an infant under seven years, to order that such infant be removed from the custody of the father, or of any guardian after the father's death, and delivered to the custody of the mother until attaining such age.

The nature of the authority exercised by the Court over its wards, and the manner in which it protects their person and property, will be found stated in the treatises on Equity Jurisprudence: we are here concerned only with the mode in which the position of the infant is brought under the notice of the Court.

2. *Infants' Estates.* By a recent statute,* power is given to the Court to approve of settlements to be made by infants on their marriage: this Act renders valid dispositions which without it would be void on account of the nonage of the settlor.

To obtain such approval, a petition† is presented, entitled in the matter of the particular settlement and of the Act: this petition sets out the circumstances of the parties to the marriage, and the settlement proposed: on the hearing, an order is made referring it to chambers to settle the deed, which is done by

* 18 & 19 Vict. c. 48.

† See a form of such Petition in the Appendix, No. XXVII.

one of the conveyancing counsel in the same manner as if the petition were presented in a cause. The execution by the infant of the deed as settled is as effectual as if the infant were of full age. Evidence* must be produced in chambers as to the age, fortune, rank and position of the infant and the proposed husband or wife, as to the parents or guardians of the infant, and as to the fitness of the proposed trustees of the settlement; and the proposals for the settlement must be submitted to the Judge in Chambers. It seems doubtful† whether an application under this Act makes the infant a ward of Court, and whether therefore, as in the case of the marriage of a ward, the Court is bound to inquire into the propriety of the marriage as well as into the fitness of the settlement; obviously, however, the latter inquiry will often indirectly lead to the former.

3. Protectorship. It is well known that a tenant in tail cannot bar the entail without the concurrence of the protector, if any, of the settlement. The Fines and Recoveries Act,‡ which established the office of protector, makes provision§ for the case of the office falling to a person who has been convicted of treason or felony, or who cannot be found: also for the case where the protector is an infant, and has no estate under the settlement prior to the estate tail, or where the settlor has declared that the office shall not belong to the person regularly entitled, but has not

* See rule 20 of the Regulations as to business in Chambers.

† *Re Dalton*, 6 De G. M. & G., 201. *Re Strong*, 5 W. R., 107.

‡ 3 & 4 W. IV. c. 74.

§ 3 & 4 W. IV. c. 74, sec. 33.

substituted any other person in his place : in all these cases, the Court of Chancery is, and if the protector be a lunatic, the Lord Chancellor or Lords Justices are, constituted protector of the settlement, and an order of Court is necessary to perfect any disentailing assurance.

This order may be obtained by the tenant in tail on petition or motion,* of which course the former is usually adopted : the petition will be entitled in the matter of the settlement and of the Act, and should show that the proposed disposition will be for the benefit† of all the objects of the settlement. On this petition, a reference to chambers will probably be directed, to approve of an instrument to carry into effect the intention ; after which an order will be made giving the required consent. It seems that this order does not require enrolment, which is necessary only in the case of consent being given by deed : and it is expressly provided‡ that the production of the order shall be evidence that a valid consent has been given.

SECTION 2.

Preservation of Settled Property.

1. Restraint in dealings with Stock. It is well known that the Bank of England and other public bodies who keep registers of the owners of their stock

* 3 & 4 W. IV. c. 74, sec. 48.

† *Re Newman*, 2 My. & Cr., 116 ; and see for forms of order *Re Gravenor*, 1 De G. & S., 702.

‡ 3 & 4 W. IV. c. 74, sec. 49.

refuse to notice on their books any equitable claims: they will always permit a transfer by the person whose name appears as owner, and by no other person.

The Court of Chancery however exercises the jurisdiction of giving some protection to equitable claimants against the improper acts of their trustees, by enabling them to restrain the bank or public company from allowing a transfer of any particular stock without certain notice being previously given to specified persons. This is accomplished in the case of the Bank of England by the writ of *distringas*, and in this case or in that of any public company by a restraining order, both granted by the Court of Chancery under the authority of a statute of 1842.* Somewhat similar in its effect is a stop order, by which the right of a person is protected, who acquires a lien on a fund which is actually in Court. Of these in order.

A *distringas* is a writ addressed to the Sheriffs of London, commanding them to distrain on the Bank of England, to compel them to appear to a bill said to have been filed against them. No such bill is in fact filed: the writ never comes to the knowledge of the Sheriffs of London to whom it is addressed; and the form gives no hint of its real effect under the statute. However, it is provided by the orders of the Court† that such a writ may be sealed by the Record and Writ Clerk, on the production to him of an affidavit that the applicant is, or that his solicitor believes him to be, interested in the stock in question,

* 5 Vict. c. 5, ss. 4 & 5.

† 27th Cons. Ord., rule 1.

which is described by its nature, its amount, and the names in which it is standing; this affidavit is filed, and the writ is sealed and taken to the bank, together with a notice desiring them not to permit a transfer of the stock or not to pay any dividends on it, as the case may be. If any application for transfer or payment be afterwards made to the bank, they will not allow the transfer, or pay the dividends, for eight days, and will at once send notice of the application to the person for whom the *distringas* was obtained. These eight days give time to institute a suit,* to which if necessary the bank may be made parties, and restrained by injunction in the regular manner: but if no steps are taken, the payment or transfer is made at the end of the eight days. The person obtaining the *distringas* may at any time discharge it by motion of course:† if any other person claiming an interest in the stock wish to discharge it, he must apply by special motion or petition on proper notice.‡

The writ of *distringas* now issuable out of Chancery is the same as was formerly issued out of the Court of Exchequer, and when the equitable jurisdiction of the Exchequer was transferred to the Court of Chancery, in 1842, this writ was retained,§ although it is now a meaningless form: this is much to be regretted, as it tends to throw an air of mystery over a most simple and beneficial procedure,—a procedure, the adoption of which would often save families from ruin now

* See *Re Amyot*, 1 Phil., 131, *note*.

† 27th Cons. Ord., rule 3.

‡ *Ibid*.

§ See 1st schedule to 5 Vict. c. 5.

brought upon them by the knavery of trustees. The effect which service of the writ and notice now have might without any disadvantage be given to the service of a copy of the notice, bearing the seal of the Record and Writ Office, to indicate that it is founded on an affidavit actually on the files of the Court. It should be here observed, that although, for the purpose of a consistent arrangement of the subjects of this Chapter, we have assumed the stock to be settled, and to be standing in the names of trustees, the remedy by writ of *distringas* is open to any one claiming a beneficial interest in the stock, whether by mortgage or otherwise, and not being the registered owner thereof. The same remark applies to restraining orders and stop orders.

A restraining order is in the nature of an injunction, restraining the Bank of England or some public company from allowing any dealing with some stock or shares specified in the order: it is granted on an *ex parte* motion or petition, stating special grounds to induce the Court to grant the application, and supported by affidavit. These orders are not much in use, and it seems that they are intended merely as preliminary steps to the institution of a regular suit. A person who has obtained a *distringas* may also obtain a restraining order.*

The Court is in the nature of a trustee of all sums of money or stock standing in the name of the Accountant-General to the credit of any cause or matter; and it is well known that the assignee of money or stock in the hands of a trustee ought, in order to

* See 1 Phil., 132.

complete his equitable title, to give notice of the assignment to the trustee: otherwise his claim is liable to be defeated by that of some other assignee of the same property, who knew nothing of the first assignment, and who did give such notice. The mode in which notice is given, on the assignment of a fund in Court, is by the assignee obtaining what is called a stop order.* This is obtainable in chambers, whenever the assignor and the assignee concur: otherwise, a special petition, with evidence of the assignor's title, and of the assignment to the petitioner, must be presented to the Court. The order is drawn up in the usual way, and left at the office of the Accountant-General; after which, no dealings can be had with the fund affected, until the stop order is finally discharged, or until an order is expressly made to deal with the fund notwithstanding the previous stop order.

2. Unclaimed Stock. When the dividends on any stock in the Bank of England have remained unclaimed for ten years, the stock is transferred to the Commissioners for the Reduction of the National Debt; and on the application of the equitable owner, or his representative, it will be retransferred, and the accumulated dividends paid. If however the Commissioners are not satisfied with the title of any claimant, and refuse to do what is required, he may petition the Court of Chancery, which is authorized to make such order as may be just on the matter. The Commissioners and the Attorney-General must be served with the petition, and provision is made for payment

* See 26th Cons. Ord.

of their costs. This jurisdiction is under a statute of 1816.*

3. Production of *cestui que vie*. If a person be in possession of land for the life of another, it is evidently his interest to conceal the death of that other, in order to enjoy the land to the prejudice of the reversioner. To prevent frauds of this nature, a statute of Queen Anne† enacts that the reversioner may apply to the Lord Chancellor for an order for the production of the *cestui que vie*; and, in default of such production, may enter on and hold the land. An order under this Act should be asked for by petition, and may, it seems, be made by a Vice-Chancellor, but not by the Master of the Rolls.‡

SECTION 3.

Management of Settled Property.

1. Lands Clauses Consolidation Act. It frequently happens that land is required to be taken for the purposes of railways, docks, and other public works, and the Legislature thinks that the public importance of the objects sought by the promoters justifies the giving them the right to take the necessary land, without regard to the willingness or ability of any person to sell it to them: in such cases the promoters obtain an Act of Parliament giving them what are

* 56 Geo. III. c. 60, and see 8 & 9 Vict. c. 62; see also 'Seton on Decrees,' 3rd edition, 1106-7.

† 6 Ann. c. 18, see 12 Sim., 104, 8 W. R., 649, and 'Seton on Decrees,' 521-2.

‡ *Meyrick v. Lawes*, 23 Bea., 449.

called compulsory powers over certain specified land: and this Act generally refers to and incorporates with itself an Act passed in the year 1845, called the Lands Clauses Consolidation Act,* as consolidating all the clauses usually found in previous Acts which empowered promoters to take land: under this Act the Court of Chancery has a jurisdiction which is frequently called into action.

If the persons interested in the land are all competent and willing to contract with the promoters, no difficulty can in general arise except as to the price, which will be fixed by arbitration or otherwise: but if the land be so settled that incompetent or unborn persons have interests therein, or if those interested, though competent, refuse to contract at all, or insist on a price which the promoters consider unreasonable, then the compulsory powers must be brought into action. First, a formal notice of the intention of the promoters to take the land is given to all persons known to be interested in it; and then machinery is provided for enabling the promoters to have a jury summoned by whom the value is assessed. If this assessed value be paid into the Court of Chancery, the promoters may enter on the land, and the rights of the owners are displaced, and attach on the money paid into Court.

If any of the persons interested wish the money in Court to be in any way dealt with, they present a petition entitled in the matter of the Lands Clauses Consolidation Act, 1845, and of the special Act under which the lands were taken, and also in the matter o

* 8 Vict. c. 18.

the estate or settlement of the owner. This petition must be served on all parties interested, and, besides its main object, prays that the costs of the petition and of the order to be made thereon or incident thereto may be paid by the promoters: this will be ordered* in all cases, except where the necessity of proceeding under the compulsory powers has been occasioned by the merely wilful obstinacy of a competent owner, or except where the Court thinks that the costs or any portion of them, ought not in fairness to be borne by the promoters.

The money is usually at once invested in stock, and the dividends† are, upon petition for the purpose, ordered to be paid to the person who for the time being would have been in possession of the land: and if the parties please, they may leave the fund in Court, obtaining a fresh order on each change of present ownership, until some person becomes entitled absolutely, when it will, if he wish, be paid out to him. But often the money is invested in the purchase of other land, or in redeeming incumbrances or the land-tax on other land settled in the same manner as that taken: in this way, the same persons get the benefit of the money, in exactly the same order as though all the original land had remained subject to the settlement. That this should be so, as far as the public convenience will permit, is the great object of all the minute provisions of the Act which we have been considering.

Every petition under this Act should contain a statement, supported by an affidavit,‡ that the petitioner

* 8 Vict. c. 18, s. 80.

† 8 Vict. c. 18, s. 70.

‡ 34th Cons. Ord., rule 3.

is not aware of any right or claim in any person to the money or any part thereof, except as may appear in the petition.

2. *Leases and Sales of Settled Estates.* The great object of the complicated trusts and powers contained in a settlement of land is the securing the rights of those who claim under the settlement, and at the same time leaving the greatest facilities for dealing with the land. But no foresight of the conveyancer is sufficient to provide for all the contingencies which arise with regard to a large property; and the consequence is that often an opportunity occurs for dealing with the property in a manner highly beneficial to all parties, but of which advantage cannot be taken, because the necessary power is wanting in the settlement. In such a case the parties were, until lately, obliged either to bear the loss, or to apply to Parliament for a private Estate Act, which was obtainable almost as a matter of course, on its being shown that the proposed dealing would be really beneficial to all parties.

This continued interference of the Legislature with private rights was objectionable on many grounds, and especially on account of the expense attending it. To obviate the necessity of many such applications for the future, the *Leases and Sales of Settled Estates Act** was passed in the year 1856. Under this Act, (provided that no application for a similar object have been made to and refused by Parliament) the person in possession of the land, provided he be

* 19 & 20 Vict. c. 120, amended by 21 & 22 Vict. c. 77, and 27 & 28 Vict. c. 45; see the General Orders on the Act, 41st Cons. Ord., rules 14-25, and see rules 21 & 22 of Regulations as to Business in Chambers.

not tenant for an absolute term of years, is authorized to apply to the Court of Chancery for its approval of any proposed lease or sale; and if this approval be obtained, the arrangement can be carried out, and will be binding on all incompetent persons claiming under the settlement: the application should be made with the consent of all competent persons who have any interest, and should be by petition entitled in the matter of the Act and settlement; on which an order is made referring it to chambers to inquire whether the proposal be beneficial. The Act carefully provides for the giving notice of the application to trustees, whether holding in trust for incompetent or unborn persons, or others; and the Court requires sufficient evidence as to who are the parties interested, and what are the circumstances which render the proposed dealing proper and expedient.* It is worthy of remark that the term "settlement" is extended by the Act† beyond its ordinary meaning, and includes any Act of Parliament, deed, agreement, copy of Court roll, will, or other instrument, or any number of such instruments by which real property is limited to several persons in succession.

3. Drainage. In general, if a tenant for life expends money in improving the estate, he cannot make any part of the expense fall on the remainderman: but a statute of 1845‡ provides that the expense of drainage may, in proper cases, be made a charge on the inheritance: and the Court of Chancery is made judge of the propriety of the proposed works. Other provisions§ have, however, been made for the same

* 41st Cons. Ord., rule 22.

† 19 & 20 Vict. c. 120, sec. 1.

‡ 8 & 9 Vict. c. 56.

§ 12 & 13 Vict. c. 100.

object, giving the Enclosure Commissioners control over such cases, and the powers under this Act are now but little used.

4. Irish Mortgage Act.* An Act was passed in 1834, whereby trustees are empowered to lend trust money on security of land in Ireland, whenever the instrument appointing them authorizes advances on English security, provided that in all cases of incompetency of those claiming under the settlement the approval of the Court of Chancery has been obtained, either in a cause or upon petition. But by section 5 such advances are not to be made where the trust instrument expressly forbids an investment on Irish security, and hence a practice sprang up among conveyancers of adding the words, "but not in Ireland," to every authority to invest on land in England: this practice reduced the Act to little more than a dead letter; and it would seem that the Act is now virtually superseded by the recent Act† known as "Lord St. Leonards' Act," which empowers trustees, where not expressly forbidden by the trust instrument, to invest the trust fund on "real securities in any part of the United Kingdom," which of course includes Ireland. Nothing is said in this Act about any application to the Court of Chancery for its sanction to such an investment, and it is conceived that, in accordance with the spirit of recent legislation‡ on the subject, the Legislature intended to leave such investment to the discretion of the trustees.

* 4 & 5 W. IV. c. 29.

† 22 & 23 Vict. c. 35, sec. 32.

‡ 23 & 24 Vict. c. 38, sec. 11; 23 & 24 Vict. c. 145, sec. 25.

CHAPTER III.

TRUSTEES.

Suits relating to Trustees are of two kinds: in one, the trustee comes as plaintiff, seeking the directions and protection of the Court in the performance of his trust; in the other, the trustee is made a defendant for the purpose of compelling him to do some act which the *cestui que trust* requires of him. The cases in which the Court exercises a summary jurisdiction with regard to trustees will be described in two Sections, corresponding with these two divisions.

SECTION 1.

Summary Proceedings by Trustees.

1. Trustee Relief Acts. If a person have in his hands a sum of money belonging to any trust whatever, and a difficulty arises in determining the ownership of this money, he need not incur the responsibility of paying it over to the person who in his judgment has the best right to it. Of course, he may do so if he please; but he will then be liable to be called upon to account over again for the amount, in case any other claimant makes out a better case in a suit instituted for the purpose of carrying the trust into

execution. A trustee placed in such a situation of difficulty has always had the right to file a bill praying for the protection of the Court: but such a course involves great expense to all parties, although the trustee, in case he appear to have been free from gross fault, will ultimately receive his costs out of the fund. A cheaper and easier mode of attaining the same object is afforded by the Acts which are commonly known as the Trustee Relief Acts,* passed in 1847 and 1849.

A trustee wishing to avail himself of these Acts must file an affidavit stating shortly, among other things,† the circumstances under which the difficulty has arisen, and the exact sum for which he acknowledges himself to be accountable, after deducting from it all that he claims for costs, or on any other account;‡ and the Accountant-General will, on production of an office copy of the affidavit, direct the payment of the amount into Court to an account so entitled as to show generally the nature of the trusts to which it is subject: the Acts make such payment a valid discharge to the trustee for the amount paid in.

In the same way, stock may be transferred into the name of the Accountant-General, which transfer will *pro tanto* discharge the trustee from any claim by the *cestui que trust*.

The money or stock in Court will be dealt with by orders made on the petition of the parties interested in it, the petition being entitled in the matter of the Acts and of the particular trusts: the petition should

* 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74.

† See 41st Cons. Ord., rule 1.

‡ *Ibid.*, rule 2.

state the affidavit under which the payment was made, and must be served on all parties claiming any interest in the property, unless they join as co-petitioners; and on the hearing the Court will, if necessary, decide the question which occasioned the difficulty to the trustee. It often happens that two or more petitions, praying for payment or transfer out of Court, are presented and heard at the same time, by the different parties claiming right: in such a case, one or more will generally be dismissed, and the order made upon one only.

The trustees do not in general appear on the petition unless it ask costs against them: it must be remembered that by paying the money into Court, the trustees so far submit to the jurisdiction that they may be ordered to pay the costs of getting it out of Court again, in case they appear to have acted vexatiously: as where a trustee refused to make a payment until he had been furnished with an unreasonable amount of evidence of the claimant's title, and yet paid the money into Court after great expense had been incurred in getting that evidence.*

The Acts do not afford any means of taking accounts between the trustee and *cestui que trust*: if the latter believe more to be due to him than the sum paid in, he must file a bill in regular course to have the accounts taken.

2. Legacy Duty Act. Under the Legacy Duty Act,† executors can pay into Court the amount of

* See Cater's Trusts, 25 Bea., 361 and 366. Knight's Trusts, 27 Bea., 45. Wyly's Trusts, 8 W. R., 645.

† 36 Geo. III. c. 52, sec. 82.

any legacy, less the duty, in case the legatee be an infant, or be beyond sea : the legacy will then be dealt with by the Court, on the petition of the party interested.

SECTION 2.

Proceedings against Trustees.

1. *Trustee Acts.** The Acts which we are now about to consider form an exception to the general rule, that under the summary jurisdiction of the Court nothing can be done which could not be done in a regular suit : for these Acts enable the Court, through its orders, to affect legal estates and rights, which no proceeding taken under the old jurisdiction could in any way touch.

The cases to which these Acts apply are too numerous to be here enumerated at length. We may say generally that under them the Court has authority to appoint new trustees, whenever it is needed on account of death, lunacy, absence, refusal to act, or for any other reason, and when any difficulty arises in making the appointment without the aid of the Court ; and also under the same Acts, vesting orders can be made by which legal estates and rights are taken out of any trustee who cannot or will not use them for the purposes of the trust, and are vested in new trustees, who can thereupon deal with the legal estate, or sue in their own names, as though this estate or right had been originally vested in them : moreover, orders can be made vesting in appointed persons

* 13 & 14 Vict. c. 60 ; 15 & 16 Vict. c. 55.

the right to call for a transfer of stock, and indemnifying the officers of the bank or other public body making the transfer accordingly. In the case of a Lunatic Trustee, application must be made to the Lords Justices.*

For the purposes of these Acts, where a mortgage has been paid off, and the mortgagee has not been in possession of the property, he is regarded as a trustee of the bare legal estate which is in him for the mortgagor or those claiming through him.

The principal of these Acts has the short title, "The Trustee Act, 1850 :—" the other was passed in the year 1852, and has no short title. Orders under them are usually made on petition, entitled in the matter of the Acts and of the particular trusts, but they may be made in any suit, where any person, whether present before the Court or not, has been declared to be a trustee within the meaning of the Act. Orders under these Acts dealing with a legal estate are liable to the same stamp duty† as would be payable in case the same dealing had been had by deed. Two examples of petitions under these Acts will be found in the Appendix, xxv. and xxvi.

In some cases, instead of obtaining a vesting order, it is more convenient to obtain under these Acts an order‡ appointing some person to execute a deed in the place of a trustee ; this is done, when to perfect the conveyance it must be enrolled, or otherwise dealt with in a manner not applicable to a vesting order.

* *Re Ormerod*, 7 W. R. 71.

† 15 & 16 Vict. c. 55, sec. 13.

‡ See *Wellesley v. Wellesley*, 4 De G. M. & G. 537.

Orders under these Acts are themselves evidence of certain facts necessary to give them validity.

2. Bankrupt Trustees. When a trustee becomes bankrupt, the petition praying for the appointment of a new trustee in his place, should be entitled "in Chancery and in Bankruptcy," and the order* will be made under the concurrent jurisdiction conferred by these Acts, and by the Bankrupt Law Consolidation Act, 1849.†

* See 'Seton on Decrees,' 779, 3rd edit.

† 12 & 13 Vict. c. 106, sec. 130. This section is not repealed by "The Bankruptcy Act, 1861."

CHAPTER IV.

ADMINISTRATION.

ONE of the most important and extensive branches of the summary jurisdiction of the Court is that by which a decree for the administration of the estate of a deceased person can be obtained on a simple summons at Chambers. There are two statutes conferring this jurisdiction: one relates to proceedings *by* executors or administrators, the other to proceedings *against* them. It will be convenient to deal with these statutes in two sections. And first we shall mention a statute which, although it did not originally contain any reference to the procedure by summons, has been by a recent Act made available by that procedure, and therefore falls properly within the first section.

SECTION 1.

Summons by Executors or Administrators.

By the 19th Section of the Act which instituted the proceeding by way of "Special Case,"* executors or administrators were enabled at the end of a year after the death of their testator or intestate, to obtain

* 13 & 14 Vict. c. 35.

an order on motion or petition of course, for a reference to the Master, to take an account of the debts and liabilities affecting the personal estate of the deceased: and by the six following sections, provision is made for appealing to the Court from the Master's decision allowing or disallowing any debt or claim, and for appropriating any part of the assets to answer contingent liabilities, and for protecting the executors or administrators in the general disposition of the assets. Executors or administrators can now obtain this order by a summons at Chambers, and without waiting for a year from the death of the deceased; for by an Act passed in 1860* it is provided that "the order to take an account of the debts and liabilities affecting the personal estate of a deceased person, pursuant to the 19th Section of the Act of the 13th and 14th years of Victoria, Chapter 35, may be made immediately or at any time after probate or letters of administration shall have been granted, and such order may be made either by the Court of Chancery, upon motion or petition of course, or by a Judge of the said Court sitting at Chambers, upon a *summons* in the form used for originating proceedings at Chambers:" and the Section concludes with the following important sentence:—"Any notices for creditors to come in, which may be published in pursuance of any such order, shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the 29th Section of the Act of the 22nd and 23rd years of

* 23 & 24 Vict. c. 38, sec. 14.

“Victoria, Chapter 35 ” (on which statute some remarks will be found hereafter).

It will be seen, on comparing the above-quoted section with the enactments of the previous statute, that there is some little conflict between them, but it is presumed that their combined effect is, that after the order has been obtained for taking the account, and the time limited in the notices for creditors to send in their claims has expired, the executors or administrators will, in distributing the assets, be safe from the demands of all claimants except those whose claims they have had notice of, and have not paid, or, if such claims be contingent, have not provided for by appropriation of assets.*

Of course there will be now no reference to the Master, but the order will simply be, “that an account be taken,”† etc.

Before concluding this Section, it is right to draw attention to a statute which, although it has no reference to the jurisdiction of the Court of Chancery, is yet sufficiently connected with the subject of this Section to require notice here. This statute was passed in 1859,‡ and (Sec. 29) enables executors or administrators by the simple process of issuing advertisements in the newspapers, without any application to the Court whatever, to obtain the same protection in distributing the assets in their hands, as would be given them by a decree or order of the Court. The enactment is as follows :—“Where an “executor or administrator shall have given such or

* See 13 & 14 Vict. c. 35, secs. 23 & 25.

† See *Re Catling*, 9 Ha. Appendix, 7. ‡ 22 & 23 Vict. c. 35.

“ the like notices* as in the opinion of the Court in
“ which such executor or administrator is sought to
“ be charged, would have been given by the Court of
“ Chancery in an administration suit, for creditors
“ and others to send in to the executor or adminis-
“ trator their claims against the estate of the testator
“ or intestate, such executor or administrator shall, at
“ the expiration of the time named in the said notice
“ or the last of the said notices for sending in such
“ claims, be at liberty to distribute the assets of the
“ testator or intestate, or any part thereof, amongst
“ the parties entitled thereto, having regard to the
“ claims of which such executor or administrator has
“ then notice, and shall not be liable for the assets
“ or any part thereof so distributed to any person of
“ whose claim such executor or administrator shall
“ not have had notice at the time of distribution of
“ the said assets or a part thereof, as the case may be :
“ but nothing in the present Act contained shall pre-
“ judice the right of any creditor or claimant to fol-
“ low the assets or any part thereof into the hands
“ of the person or persons who may have received the
“ same respectively.”

Upon this Act it is sufficient to remark, that it is extensively used by executors and administrators, (as may be seen by a glance at the daily newspapers,) and seems likely to supersede the employment of the previous Act (13 and 14 Vict. c. 35) in all cases where there are no claims or liabilities of a doubtful or contingent nature, in the adjustment of which it may be desirable for executors or administrators to seek the aid of the Court.

* See 35th Cons. Ord., rules 35-37.

SECTION 2.

Summons against Executors or Administrators.

The "Jurisdiction Act" has supplied a method by which a decree for the administration of the personal estate of any deceased person may be obtained by any person claiming to be interested in that estate, whether as creditor, legatee, or next of kin.* A summons is obtained in chambers, entitled in the matter of the deceased person, and also between the applicant as plaintiff and the personal representative as defendant, calling upon the defendant to attend and show cause why an administration decree should not be made: a duplicate of the summons is filed in the Record and Writ Office. On the return of the summons, the representative may attend, and on proof by affidavit of the claimant's interest, and of service of the summons, if necessary, a decree is made in the usual form for the administration of the estate. After this, proceedings are had in chambers, for taking the accounts and making the inquiries directed, in the same way as if the decree had been made in an administration suit regularly instituted.

The above proceeding, it will be observed, applies only to the personal estate: no decree for the administration of the real estate of a deceased person can be had on summons, except in the one case of its having been devised to trustees for sale, who have power to give receipts for the proceeds of the sale: in this case any creditor or other person interested may, on summons, have a decree for the administra-

* 15 & 16 Vict. c. 86, sec. 45.

tion of the realty as well as the personalty.* To enforce equitable rights against the real estate of a person who has died intestate, or who has not devised his realty to trustees for sale, recourse must be had to a suit regularly commenced by bill.

* 15 & 16 Vict. c. 86, sec. 47.

CHAPTER V.

MISCELLANEOUS SUMMARY JURISDICTION.

THERE remain some cases where the Court has a summary jurisdiction, which cannot well be reduced to one head. It will be sufficient here to mention that a statute of William III.* gave jurisdiction over awards to the Chancery concurrently with the Courts of Common Law; and that other cases† exist in which the Court has a summary jurisdiction, but which are deemed not of sufficient importance to call for any notice here. The jurisdiction with regard to Solicitors, Charities, Joint Stock Companies, and Registration of Titles, must be examined more at length.

SECTION 1.

Solicitors.

The authority exercised by the Court in superintending the conduct of solicitors is twofold: it partly arises under the general statute‡ passed in 1843 for consolidating and amending several of the laws relating to attorneys and solicitors; and partly from the

* 9 & 10 W. III. c. 15, and see *Heming v. Swinnerton*, 2 Phil. 79.

† See 5 & 6 W. IV. c. 76, sec. 71, and see 8 My. and Cr., 239.

‡ 6 & 7 Vict. c. 73, amended by 23 & 24 Vict. c. 127.

consideration that all solicitors are regarded as officers of the Court, and as such liable to animadversion for any misconduct in their office.

It is well known that persons are admitted to be attorneys, after having served under articles to some attorney for five years, or in certain cases for three years,* and having passed an examination; and it is the usual course, that as soon as they have been admitted attorneys they should apply to be admitted solicitors, which is done by the Master of the Rolls as a matter of course; but penalties are incurred if any person, though admitted, practise as an attorney or solicitor without having procured an annual certificate from the Stamp Office.

In cases of flagrant misconduct in the exercise of his profession, a solicitor will be struck off the rolls, and thereby disabled from longer practising. This is done on petition entitled in the matter of the solicitor in question, unless indeed the misconduct have occurred with reference to any suit, in which case the petition will be in that suit. To support such an application, it is essential that professional misconduct should be alleged and proved.

We have seen in what manner the Court guards against solicitors demanding and obtaining exorbitant amounts, when their bill has to be paid by some person, party to a suit, who is not their client. A similar protection is afforded for clients. To give time for the client to consider the expediency of resorting to this protection, it is enacted that no action can be maintained for the amount of a solicitor's bill until

* 23 & 24 Vict. c. 127, secs. 2 & 4.

one month after a copy signed by the solicitor has been delivered to the client: if the client please, he can at any time procure an order for the solicitor to deliver such a signed bill, and can also have an order of course within one month from delivery, and after one month and within twelve months from delivery an order *ex parte* for referring this bill to one of the Masters for taxation: this taxation is proceeded with in a manner similar to that already described. In general a bill cannot be referred for taxation after payment; but if the bill was paid owing to fraud or pressure,* the order for taxation may be obtained even after payment, on application, stating the specific items which are considered fraudulent, and the circumstances constituting the fraud or pressure under which the payment was made. This application will now be by summons at chambers, and not by petition as heretofore.† So an order for taxation cannot in general be obtained after the lapse of twelve months from the delivery of the signed bill; but in this case also special ‡ circumstances will induce the Court to make the order. In general, the costs of the taxation of any bill are borne by the solicitor, in case the deductions amount to one-sixth of the whole sum charged.

Besides the personal liability of his client, the solicitor has often other securities. Thus when the costs are made payable out of a fund in Court, they are

* See *Re Kinneir*, 5 Jur. N. S., 423. *Re Foster*, 6 Jur. N. S., 687. *Re Sladden*, 10 Bea., 488.

† See order of 2nd August, 1864, and *Re May*, 11 Jur. N. S., 150.

‡ See *Re Hook*, 10 W. R., 116, and see *Re Harper*, 10 Bea., 284.

ordered to be paid to the solicitor himself, and thus he will secure them, although his client be insolvent: and moreover the solicitor has a lien for his costs on the papers in the cause, which he will not be required to deliver up until his lien is discharged: and also, in case the client recover any money in the suit, the solicitor has a lien * on this fund for his costs of the suit, and can obtain a stop order for the purpose of enforcing it: nor will the client be allowed to defeat this lien by any agreement with his adversary, behind the back of the solicitor.

It will be seen that this lien extends only to cases where there is a fund in Court belonging to the client; but now by the 28th Section of the Amendment Act† (23 & 24 Vict. c. 127) the Courts of Law and Equity have power to declare a solicitor entitled to a charge upon property *of any nature or tenure* recovered or preserved by his means in any suit or matter, for his taxed costs of or in reference to such suit or matter, and the Courts are further empowered to make orders for payment of such costs out of such property.

SECTION 2.

Charities.

The Court of Chancery has for centuries exercised a jurisdiction over charities, and entertained suits on their behalf. The most regular and formal mode of

* See *Skinner v. Sweet*, 3 Madd., 244. *Turwin v. Gibson*, 3 Atk., 719.

† See *Bonser v. Bradshaw*, 9 W. R., 229. *Ex parte Thompson*, 3 L. T. n. s., 317. *Wilson v. Round*, 12 W. R., 402. *Haymes v. Cooper*, *ibid.* 539. *Wilson v. Hood*, 10 L. T. n. s., 345.

commencing such a suit is by bill or information, in which the Attorney-General, in his official capacity, is Plaintiff; but the expense of a suit may be dispensed with in cases coming within an Act known as "Sir Samuel Romilly's Act,"* which authorizes any two or more persons, with the previous sanction of the Attorney-General, to obtain the aid of the Court of Chancery on behalf of any charity by petition, in a summary way.

This Act however is somewhat limited in its operation,† and in 1853 the whole subject of charities and charitable trusts underwent revision, which resulted in the passing of the "Charitable Trusts Act, 1853."‡ By this Act a Board of four Commissioners, called "the Charity Commissioners," was established, with ample powers for inquiring into the nature, objects, condition, and management of charities, and for giving advice and directions for the administration of charity-funds, and for authorizing leases, sales, and exchanges of charity lands; and in any case where the annual income of a charity exceeds £30,§ applications on its behalf may be made to and disposed of by a Chancery Judge at Chambers, (a summons being taken out for the purpose) the Judge having a discretion to refuse to proceed on such application, if he thinks the case would be more fitly dealt with by bill, information, or petition. But in no case, except where the Attorney-General,|| acting *ex officio*, takes the

* 52 Geo. III. c. 101.

† See Phillipott's Charity, 8 Sim., 389.

‡ 16 & 17 Vict. c. 137 (amended by 18 & 19 Vict. c. 124).

§ 16 & 17 Vict. c. 137, sec. 28, and see 41st Cons. Ord., rule 10.

|| 16 & 17 Vict. c. 137, sec. 18.

initiative, can any proceedings be taken in Chancery on behalf of any charity, until the sanction of the Charity Commissioners (evidenced by their certificate to that effect) has been obtained.*

Another important statute,† known as "the Charitable Trusts Act, 1860," has greatly extended the jurisdiction and powers of the Commissioners, by authorizing them, on the application of parties interested on behalf of a charity, to make such orders as might be made by a Chancery Judge at Chambers with reference to the subject of the application; such orders to be subject to an appeal‡ to the Court of Chancery. The Commissioners may decline to exercise this jurisdiction in any case which, by reason of its contentious character, or of any special questions of law or fact involved in it, may seem to them more suitable for the adjudication of a Judicial Court.§

Moreover, where the annual income of the charity exceeds £50, the application to the Commissioners must be made by the trustees or persons acting in the administration of the Charity, or a majority of them.||

The decrees and orders made by the Court in charity cases, of course vary with the nature of the relief sought, but some special notice is required of those cases where the Court orders what is called a "scheme" to be prepared.

* 16 & 17 Vict. c. 137, sec. 17.

† 23 & 24 Vict. c. 136.

‡ 23 & 24 Vict. c. 136, sec. 8.

§ 23 & 24 Vict. c. 136, sec. 5.

|| *Ibid.*, sec. 4.

Cases not unfrequently come before the Court where, from the neglect of the charitable donor to designate clearly the objects of his bounty* (though his general intention in favour of a charitable purpose is apparent), or from the increase of the income of the property originally devoted to the charity, or from the failure† of the original objects of the charity, or from a change produced by lapse of time in the scope and usefulness of the charity, the trustees of property devoted to charitable purposes seek the aid and direction of the Court in the execution of their trust; in these cases the practice of the Court is to sanction a scheme for the guidance of the trustees in the future management of the property.

If the application be made in a suit, the order will be for a reference to chambers to approve of a scheme, and the parties will submit proposals to the chief clerk, who will embody in his certificate‡ the scheme approved of by him. If the scheme be also approved of by the Attorney-General and the Judge, the latter will sign the certificate in the usual way, and it will then, unless discharged or varied, be filed§ in the Report Office, and become binding on all parties, and the scheme will be formally confirmed by an order similar to an order made on further consideration.

If the original application be made in chambers,||

* See *Moggridge v. Thackwell*, 7 Ves., 69.

† See *Atty. Genl. v. Ironmongers Company*, 2 My. and K., 576, and see *Philpott v. St. George's Hospital*, 27 Bea., 107.

‡ See 27 Bea., 108.

§ See *Tripp's Chancery Forms*, 205.

|| See 10 Ha. App., 5.

the whole proceedings will be carried through in chambers, unless any point arise which necessitates an adjournment into Court.

SECTION 3.

Winding-up of Companies.

A further and important branch of the summary jurisdiction of the Court of Chancery is that relating to the Winding-up of Joint Stock Companies. To wind up partnerships has always been a matter of exclusively equitable cognizance, on account of the rule of the Common Law forbidding one partner to sue another in respect of partnership transactions, and on account of the complication of the accounts which in almost all cases would have to be taken, and which Courts of Equity have greater facilities of taking than Courts of Law. But to a suit in Chancery all the partners were necessary parties; and when joint stock companies became common, it was found to be practically impossible to carry through a suit, in which all the shareholders, to the number perhaps of several hundreds, were served with the bill or subpoena, and had to put in answers. Hence in 1848* a summary power was given to the Court of Chancery to make an order for winding up, on petition entitled in the matter of the particular company and of the Act: this order has the effect of an ordinary decree in a partnership suit, and under it accounts are taken, and the shareholders are compelled to contribute

* 11 & 12 Vict. c. 45, amended by 12 & 13 Vict. c. 108; both now repealed.

whatever may be necessary for payment of the creditors, in case the assets of the company are insufficient. For this purpose lists are made out and settled by the chief clerk, of the persons liable, called contributories, with the number of shares for which each is liable: and calls are from time to time made on the contributories, payment of which is enforced in the same manner as if ordered by decree. Questions continually come before the Court as to liability of particular persons, on applications to vary these lists, as settled by the chief clerk.

The matter of winding up is now regulated exclusively by an Act of Parliament* passed in 1862, the short title of which is "The Companies Act, 1862." By this Act the Court of Chancery has jurisdiction over the winding-up of all companies registered in England, except mining companies working within the jurisdiction of the Court of the Stannaries. The Act provides three modes of winding-up, viz. (1) a compulsory winding-up, under the absolute control of the Court; (2) a voluntary winding-up by the company itself out of Court; and (3) a winding-up subject to the supervision of the Court, being partly voluntary and partly compulsory, and applicable to cases where a resolution has been passed by a company to wind up voluntarily, but it is thought expedient that the creditors or contributories should have the advantage of an appeal to the Court from the decision of the "liquidators" conducting the winding-up; but for all practical purposes this mode of winding-up is the same as a compulsory winding-up, except so far as

* 25 & 26 Vict. c. 89.

the Court may, in making the order to wind up, in any way qualify or limit the extent of its supervision. We are here concerned with only the first and third of the above modes of winding-up.

The petition for winding-up may be presented by the company itself, or by a creditor of the company, or by a contributory to the company, and may be opposed like any other petition. If, upon the hearing of the petition, a winding-up order be made, a person styled an "official liquidator" is forthwith appointed by the Judge at Chambers for the purpose of carrying the order into effect, first entering into a recognisance, with two sureties, to the Master of the Rolls and the Senior Vice-Chancellor, to secure his duly accounting for what he receives as liquidator. The Act gives the liquidator or liquidators (for there may be more than one, if necessary) very large powers, exerciseable with the sanction of the Court. The first duty of the liquidator is to assist the chief clerk in settling the list of creditors of the company, and to make out and leave at the chambers of the Judge a list of the contributories, which is settled by the chief clerk, whose decision may be appealed from to the Judge, and from him the higher Courts may be appealed to. Notice of the settling day is given to the contributories, and they may attend in person, by attorney or counsel, and dispute their liability. Calls are made by order of the Judge, and enforced by the same process as other orders of Court. When the winding-up is concluded, and the official liquidator has passed his final account, directions are given for vacating the recognisances of the liquidator and his

sureties, and the chief clerk makes a certificate that the affairs of the company have been completely wound up; and (if the company has not been already dissolved) an order is made at chambers, on the application of the liquidator, by which the company is formally dissolved.

A general order of Court was made in November, 1862, containing no less than seventy-seven carefully-framed rules for regulating the procedure under the Act; to this order is appended a schedule of the various forms used in the course of such procedure. Upon this head reference may also be usefully made to Thring's 'Law and Practice of Joint-Stock Companies.'

SECTION 4.

Registration of Titles.

In this Section we propose to give a brief sketch of two statutes passed in 1862, both of which give considerable jurisdiction to the Court of Chancery. One of these statutes* is entitled "An Act to facilitate the Proof of Title to, and the Conveyance of, Real Estates," and the other† is known as "The Declaration of Title Act, 1862."

The firstly-named Act establishes an Office of Land Registry, and provides for the appointment of a Chief Registrar and assistant registrars, and examiners of title, whose duty it is to investigate all titles brought before them, with a view to the registration thereof as indefeasible; and any question or dispute which may

* 25 & 26 Vict. c. 53.

† 25 & 26 Vict. c. 67.

arise in the course of such investigation, or in the process of registration, may be referred to a Chancery Judge; and moreover by the second part of the Act it is provided, that the Court of Chancery may, upon the application of any person empowered by the Act to apply for registration of title, carry out sales of land with an indefeasible title. Such application may be made by summons at chambers, or by petition;* but the Judge may direct a bill to be filed: an order made by the Judge may be appealed from in like manner as decrees made by the Court of Chancery. The sale is carried out by a vesting order, whereby the land is vested in the purchaser without the trouble and expense of a conveyance; and the Court determines the rights of the persons entitled or claiming to be entitled to the purchase money.

The secondly-named Act† empowers the Court, upon the application by petition of any person claiming to be entitled to land (not being copyhold) in possession for an estate in fee simple, or to have a power of disposing of the fee simple for his own benefit, or of any person entitled to apply for the registration of an indefeasible title under the firstly-named Act, to make a declaration that the petitioner has an indefeasible title to the land in question, or rather (for this is the effect of the declaration) that he can convey the land to a purchaser for value, so that such purchaser shall be indefeasibly entitled thereto.‡ The preliminary order, however, upon the hearing of the petition, will be for an investigation of the title, if the

* See ss. 41 and 134 of the Act.

† 25 & 26 Vict. c. 67.

‡ See sec. 24 of Act.

petitioner has shown a *prima facie* case, and the final order or declaration will not be made unless the result of such investigation be satisfactory to the Court. At any time within six months from the making of such declaration, an appeal may be made to the Court of Appeal, and at any time within six months from the making of an order of the latter Court, an appeal may be made therefrom to the House of Lords.

These Acts having been in operation for such a short time, the profession has had but little practical experience of their working, and very few cases have hitherto been decided thereon; but it is obvious that a work of this nature would be incomplete without some reference, however meagre, to statutes which may in time produce considerable business for the Court of Chancery.

APPENDIX.

I.

BILLS.

1. *Bill seeking an Injunction and Foreclosure.*

IN CHANCERY.

Lord Chancellor.

Vice-Chancellor STUART.

Between JOHN HOLFORD and } *Plaintiffs;*
 RICHARD DAVIS ... }
 and
 HENRY HAWES..... *Defendant.*

Bill of Complaint.

To the Right Honourable FREDERICK BARON CHELMSFORD, of Chelmsford, in the County of Essex, Lord High Chancellor of Great Britain,

Humbly complaining, show unto his Lordship, John Holford, of No. 57, Bedford Street, in the county of Middlesex, Esquire, and Richard Davis, of Coleman Street, in the City of London, gentleman, the above-named plaintiffs, as follows:—

1. The above-named defendant, Henry Hawes, being seised in fee-simple of a house and premises, being No. 9, King

Street, Hackney, in the county of Middlesex, by indenture bearing date the first day of June, 1854, and duly made and executed between and by the said defendant of the one part, and Henry Baker of the other part, for the considerations therein mentioned, granted the said house and premises unto and to the use of the said Henry Baker and his heirs; subject nevertheless to a proviso in the said now stating indenture contained for redemption and reconveyance of the said house and premises, on payment by the said defendant, his heirs, executors, administrators, or assigns, to the said Henry Baker, his executors, administrators, or assigns, of the sum of one hundred pounds, with interest thereon from the date of the said indenture, after the rate of five per centum per annum, on a day in the said indenture named (in which payment default was made), as by such indenture when produced will appear.

2. The said Henry Baker died on the seventh day of May, 1857, having by his will, bearing date the tenth day of January, 1854, devised to the plaintiffs and their heirs all estates vested in him by way of mortgage, and having appointed the plaintiffs to be his executors, and the said will was on the first day of June, 1857, proved by the plaintiffs in the Prerogative Court of the Archbishop of Canterbury, and the said plaintiffs thereby became, and now are the legal personal representatives of the said Henry Baker, as by the said will and the probate copy thereof when produced will appear.

3. The defendant has from time to time made various small payments on account of interest due on the said indenture of mortgage of the first day of June, 1854, but a large arrear of interest, together with the whole of the said principal sum of one hundred pounds, is due and owing to the plaintiffs as such personal representatives as aforesaid, on the security of the said indenture.

4. On the seventh day of April, 1858, the plaintiffs discovered that the defendant intended to pull down the said house, and that he advertised the bricks comprising the same to be sold as building materials, and that he had entered into a contract with one John Smithers for the execution of the work of pulling down the same.

5. If the said house be pulled down, the said premises will be an insufficient security to the plaintiffs for the money due on the said mortgage security.

6. The defendant ought to be restrained from pulling down or injuring the said house, and ought to be decreed to pay to the plaintiffs, as such personal representatives as aforesaid, what shall be found due to them for principal, interest, and costs, on the said security, on an account to be taken for the purpose, together with the costs of this suit, or to be foreclosed absolutely of all right and equity of redemption in or to the said mortgaged premises.

7. The defendant has in his possession or power divers handbills, contracts, books, papers, and documents, whereby if produced the truth of the matter aforesaid would appear.

PRAYER.

The plaintiffs therefore pray as follows:—

1. That an account be taken of what is due for principal and interest on the said mortgage.
2. That the defendant may be decreed to pay to the plaintiffs, as personal representatives of the said Henry Baker, what shall be so found due, together with the costs of this suit, by a short day to be appointed for that purpose, or in default thereof, that the defendant and all persons claiming under him may be absolutely foreclosed of all right and equity of redemption in or to the said mortgaged premises.

3. That the defendant, his servants, agents, and workmen, may be restrained by the order and injunction of this Honourable Court, from pulling down, or suffering to be pulled down, the said mortgaged house, and from selling the materials whereof the said house is composed.
4. That for the purposes aforesaid, all necessary accounts may be taken, inquiries made, and directions given.
5. That the plaintiffs may have such further or other relief in the premises as the nature of the case may require.

Name of Defendant :

The Defendant to this Bill of Complaint is—

Henry Hawes.

X. Y. (Counsel's name.)

Note. This bill is filed by Mr. John Smith, of 70, Lincoln's Inn Fields, in the county of Middlesex, solicitor to the above-named plaintiffs.

In this suit an injunction is moved for and obtained (see No. XXI., etc.), and afterwards interrogatories are served : (see No. IV.)

*Bill seeking to settle the Construction of a Will, and
for an Administration Decree.*

IN CHANCERY.

Lord Chancellor.

Vice-Chancellor Wood.

Between JOHN STYLES.....Plaintiff;

and

JANE STYLES and ANN } Defendants.
STYLES.....

Bill of Complaint.

To the Right Honourable ROBERT MONSEY BARON

CRANWORTH, of Cranworth, in the County of Norfolk,
Lord High Chancellor of Great Britain,

Humbly complaining, sheweth unto his Lordship, John
Styles, of Rosoman Street, Clerkenwell, in the county of Mid-
dlesex, watchmaker, the above-named plaintiff, as follows :—

1. Charles Styles, late of Cottenham, in the county of Cam-
bridge, farmer, the testator hereinafter named, made his will
bearing date the second day of February, 1853, in the words
and figures following (that is to say): "I Charles Styles do,
this 2nd February, 1853, will all my property to my wife Jane,
to pay my debts and enjoy for her life, afterwards to go be-
tween our two children."

2. The said testator died on the fourth day of February,
1853, without having revoked or altered his said will, and the
said will was, on the twenty-fourth day of February, 1853,
proved by the defendant Jane Styles (called in the said will
"my wife Jane"), in the Prerogative Court of the Archbishop
of Canterbury, as by the probate copy thereof when produced
will appear.

2. The said testator left surviving him his widow the said
defendant Jane Styles, his daughter the defendant Ann Styles,
and his son Charles Styles the younger, and no other child or
issue of a child.

4. The said Charles Styles the younger died on the ninth
day of February, 1853, having by his will, bearing date the
twentieth day of June, 1850, appointed the plaintiff to be his
executor, and the said will was on the twenty-third day of
March, 1853, proved by the said plaintiff in the Prerogative
Court of the Archbishop of Canterbury, as by the probate
copy thereof will appear, and the said plaintiff thereby became
and now is the sole legal personal representative of the said
Charles Styles the younger.

5. The said testator was at the time of his death as afore-
said possessed of or entitled to considerable personal estate,

much more than sufficient for payment of his funeral and testamentary expenses and debts, and the said defendant Jane Styles possessed herself thereof, and sold the same and converted it into money, and thereout paid the funeral and testamentary expenses and debts of the said testator, and invested the residue in the purchase of a large sum of Consolidated Bank Annuities, which is now standing in the name of the said defendant Jane Styles in the books of such Annuities kept at the Bank of England, subject to the trusts of the said will; but the plaintiff is unable to discover the exact amount of such sum of Consolidated Bank Annuities.

6. The plaintiff, as such legal personal representative as aforesaid, has often applied to the said defendant Jane Styles for an account of her dealings and transactions as executrix of the said testator, and of the actual amount of the said trust fund, but the said defendant Jane Styles has always refused to give him any information on the subject.

7. Particularly on the 10th day of January, 1858, Mr. John Smith, of 70, Lincoln's Inn Fields, in the county of Middlesex, solicitor to the above-named plaintiff, wrote and sent a letter to the defendant Jane Styles, bearing date the said tenth day of January, 1858, in the words and figures or to the purport and effect following (that is to say): "I am instructed by Mr. John Styles, executor to your late son, Mr. Charles Styles, to ask you to furnish him with an account of your receipts and payments as executrix of your late husband, Mr. Charles Styles the elder, and particularly to request immediate information as to the amount of the residue of that estate, to one-half of which Mr. John Styles will be entitled on your decease, and as to the present state of investment of that amount. In the event of my not receiving a satisfactory answer from you within one week from this date, I have instructions at once to commence proceedings in Chancery against you,"—as by such letter when produced will appear.

8. No answer has been received to the said letter of the tenth day of January, 1858.

9. The said defendants sometimes pretend that, according to the true construction of the said will of the said testator, the said defendant Ann Styles and the said Charles Styles the younger became entitled to the residue of the personal estate of the said testator, after payment thereof of his funeral and testamentary expenses and debts, as joint tenants in remainder expectant on the death of the said defendant Jane Styles, and not as tenants in common of equal moieties of the said residue expectant as aforesaid, and that in consequence of the death of the said Charles Styles the younger in the lifetime of the said defendant Ann Styles, and without having done any act to sever the said pretended joint tenancy, the said defendant Ann Styles has become solely entitled by survivorship to the whole of the said residue expectant as aforesaid, and that the said plaintiff has not, as executor of the said Charles Styles the younger, or otherwise, any interest in or title to such residue, or any right to call for an account thereof, or for any information concerning the state of investment thereof.

10. The plaintiff charges that it ought to be declared by this Honourable Court that, according to the true construction of the said will of the said testator, the said defendant Ann Styles and the said Charles Styles the younger became entitled to the said residue as tenants in common of equal moieties thereof in remainder expectant as aforesaid, and not as joint tenants. And that on the death of the said Charles Styles the younger, the said defendant Ann Styles did not become by survivorship nor otherwise solely entitled to the whole of such residue in remainder expectant as aforesaid, but that the plaintiff, as executor of the said Charles Styles the younger, became entitled to one equal moiety thereof in remainder expectant as aforesaid.

11. The plaintiff further charges that the defendant Jane Styles ought to set forth an account of her receipts and payments as executrix of the said testator, and that the amount of the clear residue of the estate of the said testator ought to be ascertained and secured for the benefit of the persons entitled thereto.

PRAYER.

The plaintiff therefore prays as follows :—

1. That it may be declared that according to the true construction of the will of the said Charles Styles the elder, the defendant Ann Styles and the said Charles Styles the younger became entitled to the residue of the personal estate of the said Charles Styles the elder, after payment thereof of his funeral and testamentary expenses and debts, as tenants in common of equal moieties thereof in remainder expectant on the death of the said defendant Jane Styles.
2. That an account be taken of the personal estate of the said Charles Styles the elder, come to the hands of the said defendant Jane Styles, or of any person by her order or to her use, and of his funeral and testamentary expenses and debts, and that the clear balance of such personal estate may be ascertained and secured for the benefit of the persons entitled thereto.
3. That for the purposes aforesaid all necessary accounts may be taken, inquiries made, and directions given.
4. That the plaintiff may have such further or other relief in the premises as the nature of the case may require.

Names of defendants:—

The defendants to this bill of complaint are—

Jane Styles,

Ann Styles.

X. Y. (Counsel's name.)

Note.—This bill is filed by Mr. John Smith, of 70, Lincoln's Inn Fields, in the county of Middlesex, solicitor for the above-named Plaintiff.

In this suit the sole substantial question relates to the construction of the will: this is raised by the demurrer of the defendant Jane Styles. (See *post*, No. V. 1.)

II.

WRIT OF SUMMONS.

INDORSED ON THE COPY OF THE BILL SERVED.

VICTORIA R.,

To the within-named defendants, Jane Styles and Ann Styles, greeting:—

We command you, and every of you, that within eight days after service hereof on you, exclusive of the day of such service, you cause an appearance to be entered for you in our High Court of Chancery to the within bill of complaint of the within-named John Styles, and that you observe what our said Court shall direct. Witness ourselves at Westminster, the second day of February, in the twenty-first year of our reign.

Note.—If you fail to comply with the above directions, the Plaintiff may enter an appearance for you, and you will be liable to be arrested and imprisoned, and to have a decree made against you in your absence.

Appearances are to be entered at the Record and Writ Clerks' Office, Chancery Lane, London.

JOHN SMITH,
70, Lincoln's Inn Fields, Middlesex.

III.

APPEARANCE.

IN CHANCERY.

Styles	}	Enter an appearance for Jane Styles at the suit of John Styles.
v.		
Styles.		

Dated the eighth day of February, 1858.

HENRY JONES,
21, New Square, Lincoln's Inn.

IV.

INTERROGATORIES.

(See the Bill, No. I. 1.)

IN CHANCERY.

Between JOHN HOLFORD and	}	<i>Plaintiffs;</i>
RICHARD DAVIS ...		
and		
HENRY HAWES		<i>Defendant.</i>

Interrogatories for the examination of the above-named defendant in answer to the bill of complaint of the said plaintiffs.

1. Were you not on the first day of June, 1854, seised in fee-simple of the house and premises being No. 9, King Street, Hackney, in the county of Middlesex, or how otherwise?

2. Was not such indenture as in the first paragraph of the bill of complaint of the said plaintiffs is mentioned to bear date the first day of June, 1854, of such date, and made between, and whether or not executed by, the parties, and of or to the purport and effect in the said bill in that behalf mentioned, or of and to some other, and what purport and effect, or how otherwise? Was not default made in the payment of the sum of one hundred pounds and interest on the day in the said indenture named?

3. Did not the said Henry Baker die on the seventh day of May, 1857, or how otherwise? and whether or not having by his will, bearing date the tenth day of January, 1854, devised to the plaintiffs and their heirs all estates vested in him by way of mortgage, and appointed the plaintiffs to be his exēutors, or how otherwise? Was not the said will, on the first day of June, 1857, or when in fact, proved by the plaintiffs in the Prerogative Court of the Archbishop of Canterbury; and did not the said plaintiffs thereby or in fact become, and are they not now, the legal personal representatives of the said Henry Baker, or how otherwise?

4. Have you not from time to time made various, and what, small payments on account of interest due on the said indenture in the said bill mentioned? Set forth a full, true, and particular account of all such payments, and of the times when they respectively were made. Is it not the fact that a large arrear of interest, and whether or not together with the whole, or together with some, and what, part of the principal sum secured by the said indenture, is due and owing, and whether or not to the plaintiffs as such personal representatives as aforesaid, on the security of the said indenture, or how otherwise?

5. Did not the plaintiffs on the seventh day of April, 1858, discover, and is it not the fact, that you intend to pull down the said house in the said bill mentioned, and have you

not advertised the bricks composing the same to be sold as building materials; and have you not entered into a contract with one John Smithers, or with some other, and what, person or persons for the execution of the work of pulling down the same?

6. Is it not the fact that if the said house be pulled down, the said premises will be an insufficient security to the plaintiffs for the money due on the said mortgage security?

7. Have you not in your possession or power, or in that of your solicitors or agents, solicitor or agent, various handbills or handbill, contracts or contract, receipts or receipt, documents or document, papers or paper, relating to the matters in the said bill mentioned, or to some, and which, of them, and whereby if produced the truth of such matters or matter, and which of them, would appear?

8. Set forth a full and true list of all such of the said several particulars as are now in your possession or power, and the best list or schedule you are able of all such of the said several particulars as are not now, but formerly were, in your possession or power; and when the same were last in your possession or power, and where the same, and each and every one of them now are, and what has become thereof, and what are their contents.

The defendant, Henry Hawes, is required to answer all these interrogatories.

X. Y. (Counsel's name.)

The defendant's answer to these interrogatories will be found No. VII.

V.

DEMURRERS.

1. *Demurrer for Want of Equity to Bill given already.*

No. I. 2.

IN CHANCERY.

Between JOHN STYLES *Plaintiff*;

and

JANE STYLES and ANN } *Defendants.*
STYLES

The demurrer of the above-named defendant Jane Styles to the bill of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill. And for cause of demurrer sheweth, that it appears, by the plaintiff's own showing by the said bill, that he is not entitled to the discovery or relief prayed by the bill against this defendant. Wherefore, and on divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto. And she prays the judgment of this Honourable Court whether she shall be compelled to make any answer to the said bill; and she humbly prays to be hence dismissed with her reasonable costs in this behalf sustained.

X. Z. (Counsel's name.)

We suppose this demurrer to be overruled on argument, and the plaintiff, not requiring any discovery, moves for a decree. See No. X.

2. *Demurrer for Want of Parties.*

That it appears by the said bill that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto. And in particular it appears

that the said C. D. has been duly adjudicated a bankrupt, and assignees of his estate and effects have been duly appointed; and that it appears by the said bill that such assignees are necessary parties to the said bill; but that such assignees are not made parties thereto. Wherefore, etc.

3. *Demurrer for Multifariousness.*

That the said bill is exhibited against these defendants, and against several other defendants to the said bill, for several and distinct and independent matters and causes which have no relation to each other, and in which or in the greater part of which these defendants are in no way interested or concerned, and ought not to be implicated. Wherefore, etc.

VI.

PLEAS.

1. *Plea that Defendant is not such personal Representative as alleged.*

IN CHANCERY.

Between A. B. *Plaintiff*;
and
C. D. and E. F. *Defendants.*

The plea of the above-named defendant, C. D., to the bill of complaint of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any part of the matters or things in the said plaintiff's bill of complaint mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereto, and for plea this defendant says, that he, this defendant, is not the executor or administrator or the legal personal representative of the said G. H.

as in the said bill alleged, which said representative or representatives ought to be made a party or parties to the said complainant's said bill as this defendant is advised ; all which matters and things this defendant avers to be true, and pleads the same to the said bill, and humbly craves the judgment of this Honourable Court whether he shall make any further or other answer thereto.

X. Z. (Counsel's name.)

2. *Plea that Plaintiff is an Alien Enemy.*

That the said plaintiff is an alien, born in foreign parts, out of the jurisdiction of our Lady the Queen, (that is to say) in St. Petersburg, in the empire of Russia ; and that the said plaintiff long before and at the time of exhibiting his said bill of complaint against this defendant was and is an enemy of our Lady the Queen, voluntarily inhabiting and dwelling and carrying on trade within the empire of Russia, and within the allegiance of the Emperor of Russia, who was and still is at war with and the enemy of our Lady the Queen, and that the said plaintiff was and still is adhering to the said enemy.

VII.

ANSWER.

(The interrogatories to which the replies are here given will be found *ante*, No. IV.)

IN CHANCERY.

Between JOHN HOLFORD and } *Plaintiffs*;
 RICHARD DAVIS }
 and
 HENRY HAWES *Defendant*.

The answer of the above-named defendant, Henry Hawes, to the bill of complaint of the above-named plaintiffs.

In answer to the said bill of complaint, I, Henry Hawes, say as follows:—

1. I admit that I was on the first day of June, 1854, seised in fee-simple of the premises in the first paragraph of the bill of complaint of the said plaintiffs mentioned. And I admit that the indenture in the said first paragraph of the said bill mentioned was of such date, and made between such parties as in the said first paragraph of the said bill alleged, and that the same was executed by me. I believe that the said indenture was not executed by the said Henry Baker in the said bill mentioned. I believe that the said indenture was of or to the purport and effect in the said first paragraph of the said bill in that behalf set forth; but for my greater certainty I crave to refer to the same when it shall be produced and shown to this Honourable Court.

2. I do not know and cannot set forth, whether the said Henry Baker died on the seventh day of May, 1857, or on any other day; nor whether having by his will devised to the plaintiffs and their heirs, all estates vested in him by way of mortgage, or appointed the plaintiffs to be his executors; nor whether the said will was on the first day of June, 1857, or when in fact, proved by the plaintiffs in the Prerogative Court of the Archbishop of Canterbury; nor whether the said plaintiffs thereby or in fact became, nor whether they now are, the legal personal representatives of the said Henry Baker; but I have no reason to doubt that the facts are as in that behalf alleged in the said bill of complaint. I admit that I have heard that the said Henry Baker died some time in the year 1857.

3. The said Henry Baker was a bachelor, without any near relations, and for many years previously to the year 1854, and thenceforward to his death, he suffered from continued ill health and infirmity. My mother, Sarah Hawes, was in the service of the said Henry Baker as housekeeper from the

year 1845 down to the time of the death of the said Henry Baker, and was in continual attendance upon him; and the said Henry Baker frequently expressed to my said mother his gratitude for her attention to his comfort in that his illness.

4. I attained my age of twenty-one years in the year 1854. In the early part of that year, my said mother applied to the said Henry Baker to advance me the sum of £100 to enable me to enter business, which he agreed to do on having the repayment thereof with interest secured by the said indenture of the first day of June, 1854.

5. In the month of May, 1854, the said Henry Baker wrote, signed, and sent to me a letter bearing no date, containing the words and figures following (that is to say): "All is arranged about the security you are to give me. I hope I shall never have occasion to enforce it; and that nothing will compel me to change my intention of rewarding your mother and yourself for her long and faithful services to me,"—as by such letter when produced will appear.

6 I have never made any payments whatsoever on account of interest due on the said indenture, and I was never called upon to pay interest thereon by the said Henry Baker in his lifetime.

7. My said mother died on the twenty-seventh day of December, 1857.

8. Under the circumstances hereinbefore appearing, I submit that nothing is due on the said indenture from me to the plaintiffs, whether as such alleged personal representatives or otherwise, but I admit that nothing has ever been paid on account of the principal money secured thereby.

9. I do not know, and cannot set forth, whether the plaintiffs did on the seventh day of April discover, but I admit that it is the fact, that I intend to pull down the said house in the said bill mentioned, and that I have advertised the bricks composing the same to be sold as building materials.

I deny that it is true that I have entered into a contract with John Smithers or with any other person for the execution of the work of pulling down the same.

10. I admit that if the said house be pulled down, the said premises would be an insufficient security for the sum of £100, with interest thereon at the rate of 25 per centum per annum from the first day of June, 1854. But I submit that I have a right to pull down the said house, and to sell the bricks composing the same as building materials, and that the injunction awarded against me by this Honourable Court on the fifteenth day of April, 1858, ought to be dissolved, and that the said bill ought to be dismissed with costs.

11. I have in my possession the said letter of the said Henry Baker, written in the month of May, 1854. But, except as aforesaid, I deny that I have in my possession or power, or in that of my solicitors or agents, solicitor or agent, various or any handbills or handbill, contracts or contract, receipts or receipt, documents or document, papers or paper relating to the matters in the said bill mentioned, or any of them, or whereby if produced the truth of such matters or any of them would appear.

X. Z.

(Defendant's Counsel.)

To this answer the plaintiffs reply (see *post*, No. XI.)

VIII.

DEFENDANT'S OATH TO ANSWER.

Is that your name and handwriting? You do swear that so much of this answer as concerns your own acts and deeds is true to the best of your knowledge, and that so much thereof as concerns the acts and deeds of any other person or persons therein named you believe to be true. So help you God.

IX.

AFFIDAVIT OF DEFENDANT MAKING ANSWER
EVIDENCE.

IN CHANCERY.

Between A. B. *Plaintiff*;
and
C. D. *Defendant*.

I, the above-named defendant C. D., make oath and say:—

1. All the contents of my Answer, sworn and filed in this cause on the day of , are true as therein set forth, and I am desirous to read the same as evidence in my behalf at the hearing of this cause.

IX.*

EXCEPTIONS TO ANSWER.

IN CHANCERY.

Between A. B. *Plaintiff*;
and
C. D. and E. F. *Defendants*.

Exceptions taken by the above-named plaintiff to the answer put in by the above-named defendant C. D. to the said plaintiff's bill of complaint.

First Exception. For that the said defendant C. D. hath not answered and set forth according to the best and utmost of his knowledge, remembrance, information, and belief,—Whether the said testator, etc. [following the interrogatory].

Second Exception. For that the said defendant C. D. hath not in manner aforesaid set forth,—Whether, etc.

In all which particulars the said plaintiff humbly insists that the said defendant C. D.'s answer is altogether evasive,

imperfect, and insufficient. Wherefore the said plaintiff doth except thereto, and humbly prays that the said defendant C. D. may be compelled to amend the same, and put in a full and sufficient answer to the said bill of complaint.

X. Y.

(Plaintiff's Counsel.)

X.

NOTICE OF MOTION FOR A DECREE.

The demurrer in *Styles v. Styles* is overruled: no interrogatories are filed, and no voluntary answer put in. The plaintiff moves for a decree. (See the bill, No. I. 2.)

IN CHANCERY.

Between JOHN STYLES *Plaintiff;*
and

JANE STYLES and ANN

STYLES *Defendants.*

Take notice that this Honourable Court will be moved before the Vice-Chancellor Sir William Page Wood, on the twenty-first day of April next, or so soon after as counsel can be heard, that it may be declared that according to the true construction of the will of Charles Styles the elder, in the bill of complaint in this cause mentioned, the defendant Ann Styles and Charles Styles the younger in the said bill mentioned became entitled to such residue as in the said bill mentioned as tenants in common of equal moieties thereof in remainder expectant on the death of the defendant Jane Styles. And that an account be taken of the personal estate of the said Charles Styles the elder come to the hands of the said defendant Jane Styles, or of any person by her order or to her use, and of his funeral and testamentary expenses and

debts, and that the clear balance of such personal estate may be ascertained.

Dated this nineteenth day of March, 1855.

Yours, etc.,

JOHN SMITH,

Plaintiff's Solicitor,

No. 70, Lincoln's Inn Fields.

To Mr. Henry Jones, solicitor for the defendant Jane Styles.

To Mr. Thomas Crosthwaite, solicitor for the defendant Ann Styles.

On the hearing of the above motion the plaintiff will read the following affidavit:—

Affidavit of the said John Smith, filed the eighteenth day of March, 1855.

This affidavit will verify the bill from the first to the eighth paragraphs inclusive; there being no question as to the facts, this will be sufficient to entitle the plaintiff to the decree found *post*, No. XV. 3.

XI.

REPLICATION.

IN CHANCERY.

Between A. B..... *Plaintiff*;
and

C. D., E. F., and G. H. *Defendants*.

The plaintiff hereby joins issue with the defendant C. D., and will hear the cause on bill and answer against the defendant E. F., and on the order to take the bill as confessed against the defendant G. H.

In the case of *Holford v. Hawes*, we suppose the plaintiffs to reply to the answer given previously, No. VII. Evidence is then gone into, and a subpoena to hear judgment served: *post*, No. XII.

For the meaning of hearing on the order to take the bill as confessed, see the Chapter on Contempt.

XII.

SUBPÆNA TO HEAR JUDGMENT.

VICTORIA, etc.,

To Henry Hawes, greeting.

We command you that you appear before our Lord High Chancellor on the day of next, or whenever thereafter a certain cause now depending in our High Court of Chancery, wherein John Holford and Richard Davis are plaintiffs, and Henry Hawes is defendant, shall come on for hearing, then and there to receive and abide by such judgment and decree as shall then or thereafter be made and pronounced, upon pain of judgment being pronounced against you by default.

Witness, etc.

The bill and other pleadings in this cause have been already given : the decree will be found *post*, No. XV. 1.

XIII.

SUBPÆNA AD TESTIFICANDUM.

VICTORIA, etc.,

To ———, greeting.

We command you that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before Mr. ———, one of the examiners of witnesses in our High Court of Chancery, at his office in Rolls Yard, Chancery Lane, London, at such times as the bearer hereof shall by notice in writing appoint, to testify the truth according to your knowledge in a certain cause depending in our said Court of Chancery, wherein A. B. is plaintiff, and C. D. and others defendants, on the part of the ——— [and that you

then and there bring with you and produce, etc.], and hereof fail not at your peril.

XIV.

AFFIDAVIT PROVING EXHIBIT.

IN CHANCERY.

Between A. B..... *Plaintiff*;

and

C. D. and E. F. *Defendants*.

I, G. H., of etc., make oath and say, that the paper writing marked with the letter A produced and shown to me at the time of swearing this affidavit, is a true copy of an entry in the Register Book of Baptisms kept in and for the parish of, etc., for the year 1810, so far as relates to the baptism of the person there named, and that I did, on, etc., examine the said copy or extract with the original entry in the said Register Book of which it purports to be a copy.

And I say that I know and am well acquainted with Thomas Harris, the person named in the said copy or extract, and that he is the same person as Thomas Harris mentioned and referred to in the pleadings in this cause.

All the facts herein deposed to are within my own knowledge.

G. H. { Sworn at, etc., in the county of, etc.,
this tenth day of April, 1858, before
me,

K. L.,

A Commissioner to administer oaths
in Chancery in England.

XV.

DECREES AND ORDERS.

1. *Decree in Foreclosure Suit.*(See the Pleadings, *ante*, No. I., etc.)

VICE-CHANCELLOR S. Monday, the thirteenth day of
 December, in the twenty-
 second year of the reign of
 Her Majesty Queen Victoria,
 1858.

Between JOHN HOLFORD and } *Plaintiffs*;
 RICHARD DAVIS..... }
 and
 HENRY HAWES *Defendant.*

This cause coming on this present day to be heard and debated before this Court, in the presence of counsel learned on both sides, and the pleadings in this cause being opened upon debate of the matter and the proofs in the cause [*i. e.* the depositions, which are the only evidence,] read, and what was alleged by counsel on both sides, This Court doth order and decree, that the injunction awarded against the defendant, Henry Hawes, by an order made in this cause, dated the fifteenth day of April, 1858, be continued. And this Court doth order and decree that an account be taken of what is due to the plaintiffs for principal and interest on the mortgage in the pleadings mentioned, and for their costs of this suit, such costs to be taxed by the proper taxing master. And upon the defendant paying to the plaintiffs what shall be certified to be due to them for principal, interest, and costs as aforesaid, within six months after the chief clerk of the Judge to whose Court this cause is attached shall have made his certificate, at such time and place as shall be thereby appointed, this Court doth order and decree that the plain-

tiffs reconvey the mortgaged premises free and clear of and from all incumbrances done by them or by Henry Baker in the pleadings in this cause mentioned, or any persons or person claiming by, from, or under them, or any of them, and deliver up all deeds and writings in their custody or power relating thereto on oath, to the defendant or to whom he shall appoint. But in default of the defendant's paying to the plaintiffs such principal, interest, and costs as aforesaid, by the time aforesaid, this Court doth further order and decree that the defendant from thenceforth stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mortgaged premises. And in taking the said account, all just allowances are to be made; and all parties are to be at liberty to apply to the Court as they shall have occasion.

Under this decree, the accounts are taken, and the chief clerk certifies that £150 is due: the defendant neglects to pay this sum; whereupon he is finally foreclosed by the following order, made on motion, of course, on which the defendant does not appear.

2. *Final Foreclosure.*

VICE-CHANCELLOR S. Wednesday, the twenty-third day
of November, in the twenty-
third year of the reign of
Her Majesty Queen Victo-
ria, 1859.

Between JOHN HOLFORD and } *Plaintiffs*;
RICHARD DAVIS }
and
HENRY HAWES *Defendant.*

Upon motion this day made by Mr. X. Y. of counsel for the plaintiffs, it was alleged that by the decree made at the hearing of this cause, dated the thirteenth day of December,

1858, it was ordered that an account be taken of what was due to the plaintiffs on the mortgage in the pleadings mentioned, and to tax them their costs of this suit : that in pursuance of the said decree the chief clerk made his certificate, dated the second day of March, 1859, and thereby certified that there would be due to the plaintiffs for principal, interest, and costs on their said mortgage, on the second day of September, 1859, the sum of £150, which the said defendant was thereby appointed to pay to the plaintiffs on the said second day of September, 1859, at the chambers of his Honour the Vice-Chancellor Sir J. S., between the hours of one and two of the afternoon. That it appears by the affidavit of John Smith that he did, by virtue of a letter of Attorney from the plaintiffs, attend on the said second day of September, 1859, at the chambers of his Honour the Vice-Chancellor Sir J. S., from before the hour of one of the afternoon till after the hour of two of the afternoon of that day, in order to receive from the defendant the said sum of £150, but the said defendant did not attend to pay the said money ; and it appears by the said affidavit, and also by the affidavit of the plaintiffs that the same, or any part thereof, hath not since been paid to the plaintiffs, or either of them, or to the said John Smith. It was therefore prayed that the defendant may stand absolutely foreclosed. Whereupon, and upon hearing the said decree, dated the thirteenth day of December, 1858, the said certificate dated the second day of March, 1859, the said affidavit of the said John Smith, the said affidavit of the plaintiffs, and what was alleged by counsel for the plaintiffs ; it is ordered that the defendant do from henceforth stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mortgaged premises.

3. *Minutes of Decree in an Administration Suit.*

(See the Bill. I. 2.)

Styles } Declare that according to the true construction of
 v. } the will of Charles Styles the elder, the testator
 Styles. } in the pleadings mentioned, the defendant, Ann
 } Styles, and Charles Styles the younger, in the pleadings men-
 } tioned, became entitled to the residue of the personal estate
 } of the said Charles Styles the elder, after payment thereof
 } of his funeral and testamentary expenses and debts, as tenants
 } in common of equal moieties thereof in remainder expectant
 } on the death of the said defendant Jane Styles.

Let the following accounts and inquiries be taken and made (that is to say):

1. An account of the personal estate of the said Charles Styles the elder, come to the hands of the defendant Jane Styles, or to the hands of any other person or persons by her order or to her use.
2. An account of the testator's debts.
3. An account of the testator's funeral expenses.
4. An inquiry what parts, if any, of the testator's personal estate are outstanding and undisposed of.

And let the testator's personal estate be applied in payment of his debts and funeral expenses in a course of administration.

Just allowances.

Adjourn further consideration.

Liberty to apply.

The summons to proceed on this decree is given *post*, No. XVIII.

4. *Order for Injunction.*(See the Notice of Motion, *post*, No. XXI.)

VICE-CHANCELLOR S. Thursday, the fifteenth day of April,
in the twenty-first year of the
reign of her Majesty Queen
Victoria, 1858.

Between JOHN HOLFORD and } *Plaintiffs*;
RICHARD DAVIS .. }
and

HENRY HAWES *Defendant.*

Upon motion this day made of Mr. J. S. and Mr. X. Y., of counsel for the plaintiffs, and upon hearing Mr. X. Z., of counsel for the defendant, and upon reading an affidavit of John Smith, filed the tenth day of April, 1858, and an affidavit of the defendant, filed the fourteenth day of April, 1858, this Court doth order that an injunction be awarded to restrain the defendant, Henry Hawes, his servants, agents, and workmen, from pulling down, or suffering to be pulled down, the house in the bill of complaint in this cause mentioned, being No. 9, King Street, Hackney, in the county of Middlesex, and from selling the materials whereof the said house is composed, until the hearing of this cause, or until the further order of this Court.

Notice of this injunction is at once served: the writ itself will be found No. XXII.

5. *Order of Revivor.*

Between A. B., *Plaintiff*, and C. D., *Defendant*;
and

Between A. B., *Plaintiff*, and E. F., *Defendant.*

Upon motion, etc., of counsel for the plaintiff, it was alleged that the said plaintiff filed his bill of complaint in this suit, on, etc., and that on, etc., the said C. D. died, and

that the said E. F. has become and is the executor of the said C. D. That the said suit and proceedings having become abated in manner aforesaid, the plaintiff is desirous of reviving the same. It was therefore prayed that the said suit and proceedings may stand revived, and be in the same plight and condition that the same were in at the time of the said abatement; which is ordered accordingly.

XVI.

INDORSEMENT ON DECREE SERVED.

If you, the within-named A. B., neglect to obey this order or decree by the time therein limited, you will be liable to be arrested by virtue of a writ of attachment issued out of the Court of Chancery or by the serjeant-at-arms attending the High Court of Chancery; and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order or decree.

XVII.

ISSUE.

In the Court of Queen's Bench.

MIDDLESEX } Whereas A. B. affirms, and C. D. denies, that,
 } to wit. } etc., and the Lord Chancellor is desirous of
 ascertaining the truth by the verdict of a jury, and both
 parties pray that the same may be inquired of by the country :
 Now let a jury, etc.

XVIII.

SUMMONS TO TAKE ACCOUNTS UNDER
A DECREE.

(See the Decree, XV. 3.)

IN CHANCERY.

JOHN STYLES

against

JANE STYLES and ANN STYLES.

Let all parties concerned attend at my chambers, No. 11, New Square, Lincoln's Inn, Middlesex, on the twenty-ninth day of May, 1855, at ten o'clock in the forenoon, on the hearing of an application on the part of the plaintiff to proceed with the accounts and inquiries directed to be taken and made by the decree made in this cause bearing date the first day of May, 1855.

Dated this eighteenth day of May, 1855.

W. P. WOOD, Vice-Chancellor.

This summons is taken out by John Smith, of No. 70, Lincoln's Inn Fields, solicitor for the above-named plaintiff.

To Mr. Henry Jones, solicitor for the defendant Jane Styles,

To Mr. Thomas Crosthwaite, solicitor for the defendant Ann Styles.

The defendant Jane brings in her accounts : an advertisement for creditors is issued, but none come in. The chief clerk's certificate will be found *post*, No. XX.

XIX.

ADVERTISEMENT FOR CREDITORS.

Pursuant to a decree of the High Court of Chancery made in a cause, Styles against Styles, the creditors of Charles Styles, late of Cottenham, in the county of Cambridge, farmer,

who died on the fourth day of February, 1853, are, by their solicitors, on or before the day of , to come in and prove their debts or claims at the chambers of the Vice-Chancellor Sir William Page Wood, at No. 11, New Square, Lincoln's Inn, Middlesex; or in default thereof, they will be peremptorily excluded from the benefit of the said decree.

Monday, the day of , at two o'clock in the afternoon, is appointed for hearing and adjudicating upon the claims.

Dated the day of , 185 .

C. C.
Chief Clerk.

XX.

CERTIFICATE OF CHIEF CLERK.

(See the Minutes of the Decree, No. XVI. 3, and the Summons, No. XIX.)

IN CHANCERY.

Between JOHN STYLES*Plaintiff*;

and

JANE STYLES and } *Defendants*.
ANN STYLES }

In pursuance of directions given to me by the Vice-Chancellor Sir William Page Wood, I hereby certify, that the result of the accounts and inquiries which have been taken and made in pursuance of the decree in this cause, dated the first day of May, 1855, is as follows:—

1. The defendant Jane Styles, the executrix of Charles Styles the elder, the testator, has received personal estate to the amount of £1000, and has paid or is entitled to be allowed

on account thereof sums to the amount of £200, leaving a balance due from her of £800 on that account.

The particulars of the above receipts and payments appear in the account marked A, verified by the affidavit of the said Jane Styles, filed on the nineteenth day of June, 1855, and which account is to be filed with this certificate, except that in addition to the sums appearing on such account to have been received, the said Jane Styles is charged with the sums appearing in the schedule hereto, and except that I have disallowed the items of disbursement in the said account, numbered 8 and 12.

2. The testator was at the time of his death indebted to various persons in various sums, amounting in the whole to £150. These debts have been paid by the said executrix, and I have allowed her the amount thereof in the said account of personal estate. No debts are now due from the estate of the testator.

3. The funeral expenses of the testator amount to the sum of £50, which I have allowed the said executrix in the said account of personal estate.

4. No part of the testator's personal estate is outstanding and undisposed of.

The evidence produced on these accounts and inquiries consists of the said affidavit of the said Jane Styles.

Dated this first day of November, 1855.

C. C.

Approved this sixth day of November, 1855.

W. P. Wood, V.C.

If this cause be set down on Further Consideration, the Order will be to tax all parties their costs of the cause, those of the executrix to be taxed as between solicitor and client (see Daniell, 1079). The executrix will pay the costs to the solicitors, and will be entitled for her life to the interest on the balance.

XXI.

NOTICE OF MOTION FOR AN INJUNCTION.

(See the Bill, *ante*, No. I. 1.)

IN CHANCERY.

Between JOHN HOLFORD and } *Plaintiffs*;
 RICHARD DAVIS }
 and

HENRY HAWES *Defendant*.

Take notice that this Honourable Court will be moved, before the Vice-Chancellor Sir John Stuart, on the fifteenth day of April next, or so soon after as counsel can be heard, by Mr. J. S., of counsel for the plaintiffs, that an injunction may be awarded against the defendant, Henry Hawes, to restrain him, his servants, agents, and workmen, from pulling down or suffering to be pulled down, the house in the Bill of Complaint of the plaintiffs mentioned, being No. 9, King Street, Hackney, in the county of Middlesex, and from selling the materials whereof the said house is composed, until the Court shall make other order to the contrary.

Dated this tenth day of April, 1858.

Yours, etc.

JOHN SMITH,

Plaintiff's Solicitor,

No. 70, Lincoln's Inn Fields.

To Mr. Henry Jones, defendant's solicitor.

On the hearing the above motion the plaintiffs will read the following affidavit.

Affidavit of the said John Smith, filed the tenth day of April, 1858.

(The order made on this motion is given *ante*, No. XV. 4.)

XXII.

WRIT OF INJUNCTION.

(See the Order, *ante*, XV. 4.)

VICTORIA, etc.,

To Henry Hawes, his servants, agents, and workmen.—Whereas upon opening the matter unto us in our Court of Chancery, on the fifteenth day of April, in the twentieth year of our reign, by Mr. J. S. and Mr. X. Y., of counsel for the plaintiffs, in a cause wherein John Holford and Richard Davis are plaintiffs, and you, the said Henry Hawes, are defendant, it was ordered that, etc. We therefore, in consideration of the premises, do hereby strictly enjoin and restrain you, the said Henry Hawes, your servants, agents, and workmen, under the penalty of £ (any large nominal sum), to be levied on your and each of your lands, goods, and chattels to our use, from pulling down, etc. Witness, etc.

JOHN STUART,
Vice-Chancellor.

XXIII.

WRIT OF ATTACHMENT.

VICTORIA, etc.,

To the Sheriff of Middlesex, greeting.—We command you to attach C. D., so as to have him before us in our Court of Chancery immediately after the receipt of this writ, wheresoever the said Court shall then be, there to answer to us as well touching a contempt which he, as is alleged, has committed against us, as also such other matters as shall be then and there laid to his charge; and further to perform and

abide such order as our said Court shall make in this behalf;
and hereof fail not, and bring this writ with you.

Witness ourselves at Westminster, the day of ,
in the year of our reign.

ROMILLY, M. R.

XXIV.

SUBPŒNA FOR COSTS.

VICTORIA, etc.

To C. D., greeting.—We command you that you pay or
cause to be paid immediately after the service of this writ to
A. B. or the bearer of these presents, £ costs, in a cause
wherein the said A. B. is plaintiff, and C. D. and others are
defendants, by our Court of Chancery adjudged to be paid
by you to the said A. B., under pain of an attachment issuing
against your person, and such process of contempt as the
Court shall award in default of such payment.

Witness, etc.

ROMILLY, M. R.

XXV.

PETITION UNDER THE TRUSTEE ACTS.

IN CHANCERY.

Lord Chancellor.

Vice-Chancellor Wood.

In the matter of the Trustee Act, 1850 ;

and

In the matter of an Act of Parliament passed in the session held in the 15th and 16th years of the reign of Her Majesty Queen Victoria, chapter 55, entitled an Act to extend the Provisions of the Trustee Act, 1850 ;

and

In the matter of Henry Smith's will.

To the Right Honourable the LORD HIGH CHANCELLOR of Great Britain,

The humble petition of Thomas Russell, of Lymm, in the county of Chester, farmer, and Henry Russell (an infant under the age of twenty-one years), by the said Thomas Russell, his father and next friend,

Showeth as follows :—

Henry Smith, late of the city of Manchester, grocer, (the testator hereinafter named,) by his will bearing date the first day of January, 1839, gave and bequeathed as follows (that is to say): "I give and bequeath to my daughter Mary, now "the wife of Thomas Russell, of Lymm (meaning your petitioner, Thomas Russell), £1000 duty free, for her only use "during her life, and for her husband and then their children "after her:" and the said testator appointed Robert Jones and Michael Crosthwaite to be executors of that his last will.

The said testator died in the month of March, 1839, with-

out having revoked or altered his said will, except by a codicil, bearing date the fourteenth day of February, 1839, which did not affect the gift of £1000 to the said testator's daughter, Mary Russell, her husband and children, nor the appointment of executors in the said will contained, and without having revoked or altered his said codicil, and the said will and codicil were on the fourth day of April, 1839, proved by the said Robert Jones and Michael Crosthwaite, in the Diocesan Court of the Bishop of Chester, as by the probate copy thereof will appear.

The said executors possessed themselves of the personal estate of the said testator, and paid his funeral and testamentary expenses and his debts, and set apart a sum of £1000 to answer the said bequest to the said Mary Russell, her husband and children, and invested the same in the purchase of £1135. 7s. 10d., £3 per cent. Consolidated Bank Annuities, which sum is now standing in the names of the said Robert Jones and Michael Crosthwaite, in the books of such Annuities kept at the Bank of England.

The said Mary Russell died on the fifth day of September, 1844, leaving her surviving her husband your petitioner Thomas Russell, and your petitioner Henry Russell her only child, and without having ever had any other child.

The said Robert Jones and Michael Crosthwaite received the dividends which from time to time became due on the said sum of £1135. 7s. 10d., £3 per cent. Consolidated Bank Annuities, and paid the same to the said Mary Russell during her life, and since her death to your petitioner Thomas Russell. The dividend which became payable thereon on the 5th day of January, 1858, has not been received.

The said Robert Jones died on the first day of March, 1851.

The said Michael Crosthwaite died on the second day of January, 1858, having by his will bearing date the second

day of December, 1845, appointed Henry Dixon, of the city of Manchester, merchant, and Thomas Crosthwaite, of the said city of Manchester, stockbroker, to be his executors, and the said will was on the second day of March, 1858, proved by the said executors in Her Majesty's Court of Probate.

The said Henry Dixon and Thomas Crosthwaite are gentlemen of the highest respectability, and are willing to act in the execution of the trusts of the will of the said testator in favour of your petitioners.

Your petitioners therefore humbly pray your Lordship that the right to transfer such sum of £1135. 7s. 10d., £3 per cent. Consolidated Bank Annuities, now standing in the names of the said Robert Jones and Michael Crosthwaite, in the books of the Bank of England, and to receive the dividends thereof (including the dividend which became payable thereon on the fifth day of January, 1858), may be vested in the said Henry Dixon and Thomas Crosthwaite, in trust for your petitioners.

And your petitioners will ever pray, etc.

Note.—It is not intended to serve any person with this petition.

XXVI.

PETITION FOR APPOINTMENT OF NEW
TRUSTEES.

IN CHANCERY.

MASTER OF THE ROLLS.

In the matter of the Trustee Act, 1850,
and

In the matter of the Trusts of an Indenture of Settlement, dated the first day of April, 1830, and made between A. B. of the first part, C. D. of the second part, and E. F. and G. H. of the third part.

To the Right Honourable the MASTER OF THE ROLLS.

The humble petition of the above-named A. B. of ; Mary B. of the same place, spinster; and John B., an infant, by the said A. B., his father and next friend.

Showeth:—

1. By the above-named Indenture (being a Settlement made in contemplation of a marriage then intended and shortly afterwards solemnized between the said A. B. and C. D.), the sum of £500 secured on mortgage of the freehold estates therein mentioned, and the sum of £600 secured by bond as therein mentioned, were vested in the said E. F. and G. H., upon trust to pay the interest thereof to the said C. D. for her life, and after her death to the said A. B. for his life, and after the death of the said A. B. and C. D. upon trust in equal shares for all the children of the said A. B. and C. D., who should attain the age of twenty-one years.

2. The said C. D. died on the sixth day of April, 1850.

3. There have been four children, and no more, of the said

A. B. and C. D., viz. your petitioners, Mary B. and John B., and two sons, who died infants.

4. The said E. F. died on the tenth of May, 1855, and the said G. H. refuses to act any longer in the trusts of the said Indenture.

5. The said Indenture contains no power of appointing new trustees.

6. The trust moneys, subject to the trusts of the said Indenture, consist of the said mortgage-debt and bond-debt so settled as aforesaid.

7. Your petitioners are the only persons who are beneficially interested in the said trust funds, and they are desirous that I. K. of , and L. M. of , who are fit and proper persons for the purpose, should be appointed new trustees of the said Indenture in the place of the said E. F. and G. H.

8. The said I. K. and L. M. are willing to be appointed and to act as such trustees.

Your petitioners therefore humbly pray your Honour that the said I. K. and L. M. may be appointed trustees of the said Indenture, in the place of the said E. F. and G. H., and that the said freehold trust estates may be vested in the said I. K. and L. M. upon the trusts of the said Indenture, and that the right to sue for and recover the said mortgage-debt of £500 and the said bond-debt of £600, and to receive the interest thereon respectively, may be vested in the said I. K. and L. M. as such trustees, or that your Honour will be pleased to make such further or other order in the premises as to your Honour shall seem meet.

And your petitioners will ever pray, etc.

Note.—It is intended to serve the said G. H. with this petition.

Upon the hearing of this petition, the certificate of the marriage of A. B. and C. D., and of the death of C. D. and E. F. will be required, with affidavit of the identity of the persons named in the certificates; and A. B. should make an affidavit verifying the statements in the petition as to his children, and as to the state of the trust fund; and there must be an affidavit of the fitness of the new trustees, and they must sign a written consent to act, which signature must be verified by affidavit. The settlement being more than thirty years old proves itself.

XXVII.

PETITION UNDER THE INFANT'S SETTLEMENT ACT.

IN CHANCERY.

MASTER OF THE ROLLS.

In the matter of A. B. an infant, by C. D. her
mother and next friend,

and

In the matter of an Act of Parliament for enabling
Infants, with the approbation of the Court of
Chancery, to make binding settlements of their
real and personal estate on marriage. 18 & 19
Vict. cap. 43.

To the Right Honourable the MASTER OF THE ROLLS.

The humble petition of the above-named A. B. of
by C. D. of the same place, her mother and next friend.

Showeth:—

1. E. F., late of , farmer, was the father of your
petitioner, and by his will dated , devised as follows

[devise in favour of petitioner] and appointed the said C. D. guardian of your petitioner.

2. The said testator died on _____, without having altered or revoked his said will, and leaving your petitioner his only child him surviving, and his said will was on _____, duly proved by the executors thereof in Her Majesty's Court of Probate.

3. Your petitioner was born on the _____ day of _____, and is therefore more than 17 years of age and under the age of 21 years.

4. Your petitioner is not entitled to any fortune, except under the said devise contained in the said will.

5. A marriage has, with the consent of the said C. D., as testamentary guardian as aforesaid, and of [trustees of will if any], been agreed upon between your petitioner and G. H., of _____, Esquire, and on the treaty for the said marriage it has been agreed that the whole of the fortune of your petitioner shall be settled upon and become subject to the trusts and provisions of an indenture of settlement, the draft of which has been perused and approved by counsel on behalf of your petitioner, and has been agreed to by all parties, subject to the sanction and approbation of this Honourable Court being obtained.

Your petitioner is desirous that such settlement should be finally settled and approved of, by and under the direction of this Honourable Court, and that your petitioner should be enabled, under the provisions of the said Act, to make a binding settlement of her said fortune in accordance with the terms of the said draft indenture of settlement, or upon such other terms as this Court may think fit.

Your petitioner therefore humbly prays your Honour that a proper settlement of all the said fortune of your petitioner may be approved and sanctioned by this Honourable Court, and that your petitioner may

be at liberty and may be directed to execute such settlement as soon as the same shall have been so approved and sanctioned.

And your petitioner will ever pray, etc.

Note.—It is not intended to serve any person with this petition.

[N.B.—If the property be devised in trust, the Trustees should be served, and the above note will be altered accordingly.]

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AND TO
H. R. H. THE PRINCE OF WALES.

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7, FLEET STREET, E. C.
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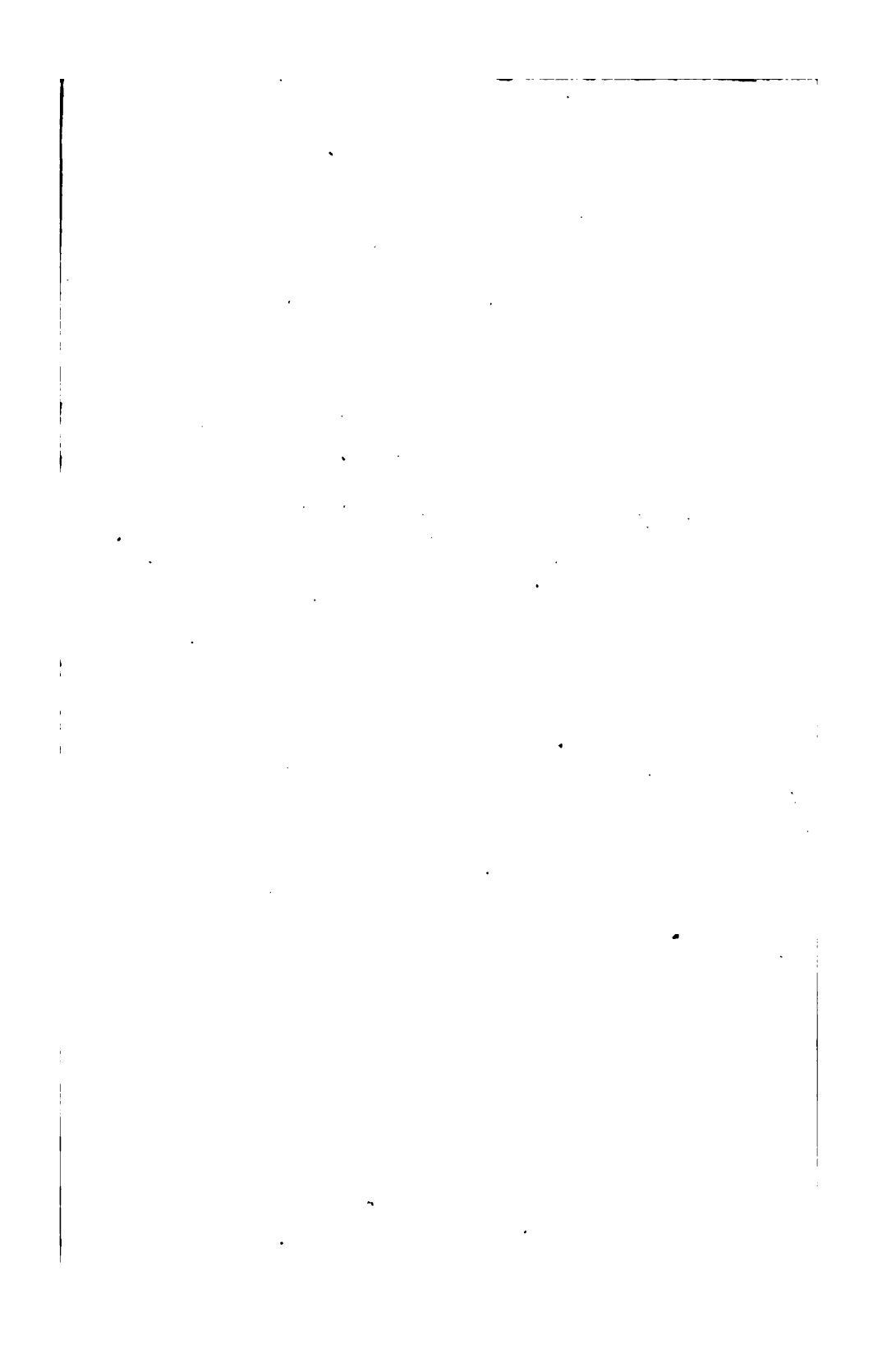
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